Supreme Court, U.S.
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# In the Supreme Court of the United States

ELIZABETH MOLLINGER-WILSON AND
LT. COLONEL ROBERT E. WILSON, USMC-RET.,
*Petitioners*,

v.

THE QUIZNO'S FRANCHISE COMPANY,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In March 2004, the United States District Court for the District of Colorado affirmed the finding of the U.S. Magistrate Judge that The Quizno's Franchise Company deprived petitioners of a *"substantial benefit of their bargain and has, therefore, materially breached"* a Termination and Release Agreement. That Agreement, executed before the same United States District Court, was a contract to settle a federal civil action that respondent filed against petitioners in January 2000. In dismissing that civil action, Quizno's declared their litigation was "regrettable." Although finding in favor of petitioners that there was a material breach, the District Court denied petitioners' motion to compel discovery along with a leave to amend the Complaint and granted respondent's "cross-motion" for summary judgment solely on damages awarding petitioners $969.86. Although respondent did not appeal, the Tenth Circuit reduced damages to one ($1) dollar. This petition includes Constitutional questions regarding a citizen's right to privacy to be secure in one's papers, procedural due process and new questions regarding federal law. The questions presented are:

1. Under the landmark (1986) opinions of this United States Supreme Court regarding Federal Rule of Civil Procedure 56, does the moving party in a "cross-motion" for summary judgment bear the same burden as the moving party in the initial motion for summary judgment?

2. Is it a Constitutional violation of a citizen's right to be secure in their personal papers when a U.S. Magistrate Judge orders a citizen to produce copies of their federal income taxes for the singular reason to be used "at the time of trial," and then allows those same papers to be used by the opposing

party, unsealed, in open record, in a "cross-motion" for summary judgment solely on damages?

3. Does a *pro se* party's pleadings, notarized Declaration and income tax returns, submitted under the Federal Rule of Civil Procedure 11 standard, pass the test of sufficient evidence as the non-moving party, responding to a "cross-motion" for summary judgment under Federal Rule of Civil Procedure 56?

4. Does a technical Scheduling Order error prohibit a *pro se* party from amending the Complaint under Federal Rules of Civil Procedure 15 or 16?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties are set forth in the caption. *Pro Se* Petitioner, Robert E. Wilson, is represented as Lt. Colonel Robert E. Wilson, USMC-Ret. in the captions submitted to the U.S. District Court for the District of Colorado and the Tenth Circuit Court of Appeals. *Pro Se* Petitioner, Elizabeth Mollinger-Wilson is referred herein as Elizabeth Wilson.

Respondent, The Quizno's Franchise Company ("Quizno's"), changed from a corporation to a limited liability company in May 2002 at which time it changed its name to The Quizno's Franchise Company LLC.

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## PETITION FOR WRIT OF CERTIORARI

*Pro Se* Petitioners, Elizabeth and Robert Wilson pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered on December 3, 2004.

## OPINIONS BELOW

The order of the United States Court of Appeals for the Tenth Circuit denying the petition for rehearing en banc is reproduced as Appendix (App.) B. The opinion of the Tenth Circuit is reproduced as Appendix C. The orders of the United States District Court for the District of Colorado are reproduced as Appendices A, D, E and I.

## JURISDICTION

The opinion of the Tenth Circuit was filed and entered on December 3, 2004. App. C. The order of the Tenth Circuit denying the petition for rehearing en banc was entered on December 30, 2004. This petition for writ of certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fourth Amendment of the United States Constitution provides, in pertinent part, that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, [shall not] be violated."

The Fourteenth Amendment of the United States Constitution guarantees the right of procedural due process in civil cases. This Court has been zealous to protect these rights from erosion. *Greene v. McElroy*, 360 U.S. 474 (S. Ct. 1959).

Title 16 CFR Part 436: Chapter 1 – Federal Trade Commission, Subchapter D – Disclosure Requirements and Prohibitions Concerning Franchising §(16) provides, in part, a franchisor must disclose accurately, clearly and concisely stated, in a legible, written document: "A statement disclosing, with respect to the franchisor: (iii) The names, addresses, and telephone numbers of: (B) all franchisees of the franchisor; or (C) all franchisees of the franchisor in the State in which the prospective franchisee lives or where the proposed franchise is to be located."

Federal Rule of Civil Procedure 56, in part, provides:

56(c): "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

56(d): "If on motion under this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceeding in the action as are just."

Federal Rule of Civil Procedure 11, in part, provides:

11(b): "By representing to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief ... (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

## STATEMENT OF THE CASE

### A. Statement of Facts [1]

In June 1998, petitioners entered into an Area Director Marketing Agreement ("ADMA") and paid $57,859 for the rights to represent respondent in the northeast Wisconsin (Green Bay/Appleton) area.[2] The terms of the ADMA provided for petitioners to receive sales commissions, site services commissions and 40% commissions on royalty fees received by respondent from each franchise in the territory.

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[1] This statement of facts is based on the Complaint and Petitioners' Opening and Reply Briefs that complied with Fed. R. App. P. Rule 28 and 10th Cir. R. 28.2(C) (2) citing the precise reference in the record where the issues were raised.

[2] The Tenth Circuit makes an egregious error in stating that petitioners represented respondent in *"specific parts of the Rocky Mountain region."* App. C at 6. The Complaint jurisdiction properly identified that contractual Riders to the ADMA apply. Those Riders are for the State of Illinois and Wisconsin Statute Title XIV-A, Chapter 135, and the Wisconsin Fair Dealership Law that affects the termination of petitioners' ADMA. The ADMA appears at R. Doc. 13, Exhibit 1in the record on appeal, filed in the Tenth Circuit on May 24, 2004.

Respondent terminated petitioners' ADMA in January 2000 and filed suit in the United States District Court for the District of Colorado seeking a declaratory judgment that the ADMA be properly terminated. (Civil Action #00-N-163). [3] Respondent sought settlement to their litigation and declared that the filing of their Complaint was *"regrettable"* and respondent *"did not intend to impugn [petitioners] character or business practices in any manner."* App. L at 76-77. On February 28, 2000, both parties executed a Termination & Release Agreement ("Agreement"). App. L.

The language of the Agreement, in part, provided that as consideration for petitioners relinquishing [their] rights under the ADMA, [respondent] shall pay petitioners the amount of $57,859 plus one (1) franchise agreement substantially equal to [respondent's] present form franchise agreement and "valid" for 40 months from the [February 28, 2000] effective date of the [Termination] Agreement, which the petitioners may "use" in the Territory or which the petitioners may sell to a third-party. App. L at §2.

The language of the Agreement, in part, also was a release for claims, demands, obligations, actions, liabilities, and damages, "except and unless" such arises from a "breach" in respondent's obligations to be fulfilled pursuant to the Agreement. App. L at §6.

Respondent paid petitioners $57,859 shortly after three (3) days of executing the Agreement. Respondent's General Counsel, in a Declaration under penalty of perjury, admitted respondent had virtually no contact with petitioners in the ten months after executing the Agreement. The record

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[3] The Tenth Circuit decision erroneously states that plaintiffs brought suit against Quizno's. App. C at 6.

established petitioners asked for the franchise agreement and, in November 2000, petitioners informed respondent's Denver attorney, who negotiated the Agreement, that they considered the Agreement breached.

The franchise agreement and Uniform Franchise Offering Circular ("UFOC") was not sent by respondent until January 5, 2001, nearly eleven (11) months after signing the Agreement. It is undisputed that the franchise agreement, sent on January 5, 2001, was not signed by respondent's General Counsel as authorizing officer and not legally binding or "valid."

Petitioners testified they relied on receiving the franchise agreement "right away." Petitioner, Elizabeth Wilson, who negotiated the Agreement, testified petitioners' expectations at the time of signing the Agreement were to receive income and investment as well as recover the financial loss from the former area and were prepared to build a woman-owned franchise within six (6) months of signing the Agreement. Respondent's Denver attorney agreed that petitioners' intent was to "use" the franchise agreement. It is undisputed that, to this day, petitioners have no license or rights to own, operate, sell or transfer a Quizno's franchise. R. Doc. 72, filed 1/3/03 at 4 ¶ 9.

Title 16 CFR Part 436 of Federal Trade Commission regulations requires written disclosure of all franchisees of the franchisor in the State in which the prospective franchisee lives or where the proposed franchise is to be located. The State of Wisconsin Department of Financial Institutions certified, under seal, that neither of the petitioners were disclosed in either the list of Wisconsin franchises "in operation or unopened" franchises in the year of, or subsequent to, signing the Agreement. App. K.

Petitioners were not disclosed per certain State Franchising laws (such as 815 ILCS 705/1 for the State of Illinois that requires disclosure of franchise brokers) to sell the Agreement. Respondent's UFOC, published in December 2000 after the Agreement was signed, publicly disclosed petitioners as having "left Quizno's system" as an area director and franchisee in fiscal year 2000.

It is disputed that the material breach could be, or was ever, cured. The UFOC corresponding to the franchise agreement sent on January 5, 2001 was amended in December 2000 after the Agreement was executed. Petitioners testified to material differences, including sublease guarantees and advertising co-ops, which were not consistent with the form franchise agreement at the time the Agreement was signed. Respondent demanded a transfer fee if the franchise agreement would be transferred. The Agreement contained no provision for a transfer fee.

The record establishes that on January 9, 2001, after the franchise agreement was sent, petitioners asked that a franchise agreement be made tangible for the Appleton/Green Bay/ Neenah/Menasha area. On January 15, 2001, respondent's Denver attorney, who was trying to resolve the breach, wrote that he had been asked to "cease work" on the matter. On January 16, 2001, respondent's authorizing officer to make "valid" a franchise agreement terminated dialogue with petitioners. No new Agreement was executed.

Petitioners were trained as Area Directors in respondent's business and financial (profit) models. Respondent publishes historical data and average gross sales for restaurants, in their UFOC, as the basis for their Earnings Claims. Average gross sales for respondent's franchises which were open for the

period from October 2000 through September 2001 were $386,505. That number increased to $400,000 in year 2002.

Consistent with the Order (to produce federal income tax returns to be used at the time of trial) as issued by the U.S. Magistrate, plaintiffs produced their federal income tax forms, including Form 1065 with itemized expenses, accompanied by a notarized Declaration that showed a related lost income of $206,816 and lost expenses of $85,136. R. Vol. VI at page 18, filed in the Tenth Circuit on May 24, 2004 and R. Supplemental Vol. I, filed in the Tenth Circuit on July 16, 2004.

Respondent used petitioners' income tax forms, not "at the time of trial," consistent with the U.S. Magistrate's order, but in open record, unsealed, in their reply brief in their "cross-motion" for summary judgment solely on damages.

**B. Procedural History**

In March 2002, petitioners returned to the United States District Court for the District of Colorado and filed their Complaint for the *"willful and deliberate"* breach of contract, as made before the same District Judge and Court. As the Agreement was ambiguous regarding recovery of attorney fees/costs, petitioners returned *pro se*, for oneself.

Two months later, after the Scheduling Order was executed, respondent filed a Motion for Judgment on the Pleadings contending that a one-year contractual limitation applied and that petitioners' claim was untimely. Respondent told the Court that the failure to provide petitioners with a franchise agreement within three (3) business days of February 28, 2000 occurred on March 2, 2000 (three business

days hence) and the breach *"occurred at the latest on March 2, 2000."* App. J at 67.

In May 2002, the Magistrate vacated the Scheduling Order; recommended dismissal by finding a one-year contractual limitation applied and denied respondent's motion for attorney fees and costs. The Magistrate, addressing other issues, found petitioners argued that the continuing breach was "willful and deliberate" and *"the undisputed fact in this situation is that plaintiffs received a franchise agreement, pursuant to the Termination Agreement, on January 5, 2001, and [petitioners] found it not "substantially equal" to the present form franchise agreement."* Emphasis added. App. J at page 67; 68.

The U.S. District Court for the District of Colorado reviewed the recommendation under Fed. R. Civ. P. 72(b), as the Magistrate did not have jurisdiction under 28 U.S.C. § 636(c). Pending that decision, petitioners put forth their dispositive summary judgment motion, as moving party, relying on Fed. R. Civ. P. 56, *Celotex Corp. v. Catrett*, 477 U.S. 317 (S. Ct. 1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (S. Ct. 1986). Petitioners pointed to the language of the Agreement that required a "valid" franchise agreement and that the breach was not cured as it is undisputed fact that petitioners had, nor have, a "valid' franchise agreement to this day. In support of their motion, petitioners pointed to numbered undisputed facts and the admissible Certificate from the State of Wisconsin, where the franchise was to be located, attesting to the fact that petitioners were never disclosed, in a franchise either open or unopened. App. K.

Regarding damages, petitioners asked for a minimum of $300,000 in relief and pointed to respondent's Answers &

Affirmative Defenses (and subsequently to respondent's defenses in the Scheduling Order and Pretrial Order) where respondent did not dispute petitioners' minimum damages, lining up their defenses that: 1) petitioners' claim was untimely and 2) a breach had not occurred. A party waives all affirmative defenses and objections not present in answers. *Alienlin v. Futleman*, 924 P.2d 1063 (Colo. Ct. App. 1996).

Petitioners relied on controlling law in breach of contract, citing a defendant is liable for all damages resulting from the breach which could have reasonably and fairly been contemplated by the parties at the time of execution of the contract. *International Broth'd. of Elec. Workers, AFL-CIO v. A-1 Elec. Service, Inc.*, 535 F.2d 1 (10th Cir. 1976). In a breach of contract action, a party seeking damages for future lost profits must establish with reasonable, *but not necessarily* mathematical certainty both the fact of the injury and the amount of the loss. *Terones v. Tapia*, 967 P.2d 216 (Colo. Ct. App. 1998). The determination of damages involving the wrongful termination of a franchise can include some difficult calculations; the non-breaching party should receive his "expectancy." *Breach and Remedies*, §8.05, *Corbin on Contracts*, Revised Edition, Vol. 8.

In September 2002, the U.S. District Court for the District of Colorado ruled there was *"simply no basis"* for any contention that a one-year limitation survived the ADMA. Respondent's motion was DENIED and the case was RECOMMITTED to the Magistrate for further pretrial proceedings. App. I.

In October 2002, an Amended Scheduling Order was issued by the Magistrate. That order failed to set a new date for amendment of the pleadings, as the original (and past) date of June 14, 2002 had been vacated by the Magistrate's

Recommendation For Dismissal. R. Doc. 51, Amended Scheduling Order, filed 10/22/02.

In December 2002, after petitioners sat for nearly eight (8) hours of depositions, respondent replied to petitioners' summary judgment motion. Respondent countered that summary judgment was entirely inappropriate in this case, because nearly every material fact is in dispute. Respondent's one-page response, regarding damages, argued that damages (assuming a breach) caused by having the franchise agreement over ten months late, *"would be interest on $20,000"* for less than eleven months. R. Doc. 67, Response, filed 12/13/02.

Respondent dismissed their failure to register petitioners with the State of Wisconsin, arguing because petitioners' ADMA was terminated in 2000 and petitioners failed to sign the franchise agreement they received in January 2001, petitioners were out of Quizno's system in 2000. It should be noted that respondent published petitioners as having left Quizno's system in their December 2000 UFOC and the franchise agreement was not sent until after the New Year in January 2001. R. Doc. 67, Response, filed 12/13/02 at page 6; 11.

Respondent, also, now stated that there was no fixed time to provide petitioners with a franchise agreement, although in their earlier dispositive motion, respondent stated that the breach occurred on March 2, 2000. And, although the U.S. Magistrate found it undisputed fact that the franchise agreement was not *"substantially equal,"* respondent now stated that the franchise agreement was.

In January 2003, the parties executed a Pretrial Order. In that Order, respondent made no issue of petitioners' damages, stating in their defenses that petitioners were *"effectively*

*depriving Quizno's of the royalties it is entitled to receive under the franchise agreement."* Petitioners indicated that they would be calling respondent's General Counsel and Denver attorney and Vice President as witnesses. Both parties agreed they expected no additional requests for documents and that they expected no further limitations to be placed on discovery. R. Doc. 74, Pretrial Order, filed 1/7/03 at page 3; 4. A district court is justified in relying heavily on a Pretrial Order in ruling on summary judgment motions. *Hung Duc Bui v. IBP, Inc.*, 201 FRD 502 (DC Kan 2001).

One week after respondent stipulated in the Pretrial Order there would be no added requests for documents, respondent filed a Motion to Compel seeking, among other documents, copies of petitioners' federal income tax returns. R. Doc. 75, Motion to Compel, filed 1/14/03.

In February 2003, as the Complaint embodied that the continuing breach was "willful and deliberate" and within days of respondent admitting there were disclosure requirements, petitioners filed leave to amend the Complaint for fraud and fraudulent misrepresentation. Petitioners reasoned that Quizno's never intended to make "valid" a franchise agreement and stalled sending a franchise agreement until the supposed one-year contractual limitation came close to expire (as respondent first argued for in their Motion for Judgment on the Pleadings). Petitioners argued that respondent, first, had an independent duty of care to properly ensure that petitioners had been timely disclosed with the UFOC and franchise agreement for study and a promise to do future act, made with no intent to abide by a promised performance constitutes a form of fraud. *Bock v. Brody*, 870 P.2d 530 (Colo. Ct. App. 1992). R. Doc. 86, Motion to Amend, filed 2/12/03.

On February 13, 2003, a hearing was held before the U.S. Magistrate regarding respondent's Motion to Compel. The Magistrate ordered that petitioners produce their federal income tax returns, reasoning as follows:

> "[I]n any case where a party is claiming lost wages or damages such as lost profits as in the circumstances of this case, Quizno's is going to be entitled to have your income tax returns so that they can effectively cross-examine you at the time of trial with regard to your claim that your income is up or down or whatever your claim might be at the time of trial. They are entitled to know as much about your finances as you know about your finances when you make a claim that you've suffered a loss in income. So for that reason, I am granting their request to have your federal income tax returns produced, and we'll direct you to produce them ...." Emphasis added. R. Vol. VI, Transcript, filed 2/13/03 at page 18 in the record on appeal in the Tenth Circuit, filed May 24, 2004.

In the same hearing, although having argued against summary judgment, respondent, now stated their intent to file their own "cross-summary judgment" motion. Consensus was met that respondent would either use an unopposed motion for an extension to wait to receive the documents as ordered by the Magistrate or amend their motion once the documents were received. R. Vol. V, Transcript, filed 2/13/03 at pages 5-9 in the record on appeal in the Tenth Circuit, filed May 24, 2004.

In February 2003, six months after petitioners filed their Motion for Summary Judgment, one month after the discovery deadline and on the last day to file a dispositive motion, respondent neither used the unopposed extension, nor

(would later) amend their motion after receiving petitioners' documents and filed a "cross-motion" for summary judgment on petitioners' damages. Respondent argued that petitioners failed to provide even a *"scintilla"* of evidence pertaining to damages. R. Doc. 91, M. for Summary Judgment, filed 2/18/03 at page 2.

As respondent used petitioners' federal income tax returns, not in a trial or their opening brief, but in open record, unsealed, in their reply brief, petitioners made timely objections to the use of their federal income tax returns and argued that respondent's motion was brought in bad faith. Notably, now as non-moving party, petitioners produced a notarized Declaration Re Federal Income Tax Returns with a copy of federal form 1065 in support of their damages along with their sworn depositions, the Certificate from the State of Wisconsin and respondent's own published earning claims from their UFOC. Petitioners argued there was sufficient evidence to warrant a "trial on damages," if they had failed to demonstrate that damages were not in dispute. R. Supplemental Vol. I, Doc. 121 in the Tenth Circuit, filed on July 16, 2004.

Faced with respondent's "cross-motion" for summary judgment and consistent with the Pretrial Order (in which is was agreed there was no further limitations on discovery), petitioners, also filed a Motion to Compel seeking depositions from respondent relating to the issues in dispute, including profits, or in lieu of taking depositions, asked for additional requests for admissions and documents related to profits and lost expenses. Petitioners had properly served requests for interrogatories, admissions and a subpoena for depositions (per local rules 26.1, 30.1 and 37.1) and respondent either: 1) would not readily comply stating the subpoena was not proper; 2) would only produce their General Counsel for

depositions, but would not waive attorney confidentiality; and 3) evaded answering the requests for admissions or produce documents related to profits. Consistent with the (web page) instructions of the U.S. District Judge for documents not to be re-submitted to the Court, petitioners did not attach repeat copies of respondent's answers to admissions, etc. as they had already been submitted in petitioners' objections to respondent's motion to compel. R. Doc. 81, filed 1/24/03 and R. Doc 94, Motion to Compel, filed 2/24/03.

In March 2003, the U.S. Magistrate denied petitioners' Motion to Compel citing that the deadline for discovery had passed and, also, denied petitioners' Motion for Leave to Amend the Complaint as discovery was closed and the (vacated) deadline to amend pleadings had also passed. The Magistrate relied on Fed. R. Civ. P. 16 requiring a showing a good cause and addressed only the issue of fraudulent misrepresentation, although petitioners had, also, asked for leave to amend for fraud. Timely objection under Fed. R. Civ. P. 72 was made. App. G and App. H.

One (1) year since petitioners first filed their Motion for Summary Judgment, in September 2003, the U.S. Magistrate issued his recommendation on both motions. The Magistrate recommended granting petitioners' summary judgment motion, in part, finding a material breach and granting respondent's "cross-motion" for summary judgment on damages, awarding petitioners "interest" on $15,000. App. F.

The U.S. Magistrate, also, found that: 1) the Agreement set forth no language which placed upon petitioners a duty to contact respondent to receive the franchise agreement; 2) petitioners could not reasonably have been expected to decide to "use" the franchise agreement themselves until the

franchise agreement was provided to them; and 3) *"by failing to provide the franchise agreement within a reasonable time,"* respondent *"deprived [petitioners] of a substantial benefit of their bargain and has, therefore, materially breached the Agreement."* App. F at 36; 37 and 41. Respondent did not appeal the recommendation of the Magistrate.

Petitioners made many objections to the recommendation including that substantial controversy existed that the material breach could be, or was cured – thereby, cutting short damages. All authorities state that a cure must be reasonably and "timely" made and such was inconsistent with the Magistrate's finding that the breach occurred due to an "untimely" delivery of the franchise agreement. That the Magistrate based petitioners' intent, not on the contractual language, or after the franchise agreement was sent, also created controversy. By the Magistrate's own finding, petitioners could not have been expected to decide to "use" the franchise agreement, until it was sent. Concurrently, petitioners objected to the January 3, 2001 document respondent used expressing a willingness to transfer the rights to the franchise, as petitioners tried to recoup pennies on the dollar and subsequent documents asked that the franchise agreement be made tangible to "use." Extrinsic evidence is only admissible to prove intent where there is ambiguity in the contract and the Court must not look beyond the four corners of the Agreement to determine intent. *Vu, Inc. v. Pacific Ocean Marketplace, Inc.* 36 P.3d 154 (Colo. Ct. App. 2001). Further, construction of a contract is to divine the parties intent. *New York Life Ins. Co. v. K.N. Energy, Inc.*, 80 F.3d 405, 411 (10th Cir. 1996).

Petitioners argued it was improper for the Court to make findings of fact about which there was substantial controversy. *United States v. Mills*, 372 F.2d 692 (10th Cir.

1966). Summary judgment is no more appropriate when predictive facts are disputed than when historical facts are in dispute. *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000). And, the Court should neither have rewritten the contract, nor limited its effect by a strained construction. *Farmers Ins. Exchange v. Taylor*, 45 P.3d 759 (Colo. Ct. App. 2001). R. Doc. 120, Objections, filed 10/17/03 and R. Doc. 121, filed 10/20/03.

In March 2004, the U.S. District Court for the District of Colorado issued their opinion accepting the recommendation of the Magistrate, inclusively also rejecting petitioners' motion to compel or leave to amend the Complaint. The District Court ruled: 1) the court may consider only admissible evidence when ruling on a summary judgment motion and 2) pleadings, briefs and motions are not evidence. The U.S. District Court did not address any of the objections that petitioners properly raised, including whether or not a material breach can be cured or to the admissibility of extrinsic evidence. Petitioners were awarded $969.86 in "interest" damages, plus their costs, in granting respondent's cross-motion for summary judgment. Quizno's did not appeal the decision and paid the judgment that found they materially breached the Agreement made before federal court. App. E.

In April 2004, petitioners appealed to the Tenth Circuit Court of Appeals on the grounds that the District Court's opinion was inconsistent with this U.S. Supreme Court's standard for motions for summary judgment. Although the Tenth Circuit's opinion does not recognize their theory, petitioners argued (in both the recommendation of the Magistrate and the opinion of the U.S. District Court) that the structure of the rulings, clearly demonstrated that the two motions (petitioners' summary judgment motion and respondent's "cross-motion") were merged, thereby wrongly

relieving Quizno's of any burden as moving party in their cross-motion. Appellant's opening brief at page 15-16.

Petitioners noted their motion for summary judgment was not ruled upon, until over one (1) year after being filed, when the Magistrate made his recommendation on both motions, never untangling the two. Petitioners argued that: 1) their motion should have been granted in full, or a trial on damages held or 2) respondent's motion should have been denied as they failed to meet their burden, relying on "there was no evidence" theory of damages, and a trial on damages held.

Petitioners also filed Supplemental Authorities citing § 242 Restatement (Second) of Contracts stating that as any breach gives rise to a claim, a party who has cured a material breach has still committed a breach, by his delay for which he is liable in damages and § 278, stating if the obligor offers a performance that differs from what is due in full or partial satisfaction of his duty, the obligee need not accept it. Petitioners pointed to substantial controversy that a material breach can be, or was, cured and the amount of damages.

In December 2004, almost four (4) years after respondent terminated petitioners' ADMA and settled their litigation in federal court, the Tenth Circuit reduced the issues in this case to "*plaintiffs lack of proof on damages*," did not untangle the two summary judgment motions giving each its individual burden and "*declined to examine the differences between the versions of franchise agreements*." App. C.

The Tenth Circuit relied solely on Colorado law (although respondent themselves relied on "Colorado and other federal law" surviving the ADMA), did not address petitioners' objections or give any credence to the evidence presented by petitioners, including their federal income tax returns, ruling

that petitioners' notarized Declaration fell short. The Tenth Circuit concluded that petitioners failed to carry their burden to prove damages as a result of either the untimely delivery, or the unsubstantially equal content of the franchise agreement.

Although respondent paid the $969.86 judgment plus costs, establishing the final material element of petitioners' claim (i.e. damages), the Tenth Circuit REMANDED the case back to the District Court to reduce the award to one ($1) dollar. That one dollar sits, today, in the Court Registry Investment System.

## REASONS THE PETITION SHOULD BE GRANTED

### I. THE TENTH CIRCUIT'S DECISION SQUARLY CONFLICTS WITH 28 U.S.C. § 636(b) (1), THE LANDMARK OPINIONS OF THIS U.S. SUPREME COURT AND QUESTIONS OF FEDERAL LAW REGARDING "CROSS-MOTIONS" THAT HAVE BEEN SETTLED BY OTHER CIRCUIT COURTS, AND SHOULD BE ADDRESSED, BY THIS COURT.

The practical effect of the Tenth Circuit's ruling reduces litigation in federal court to nothing more than a horse-race. Here, respondent put their best horse on the track, namely, respondent's first motion for judgment on the pleadings, only to have that horse falter. Now, on the losing end as their defenses fell (and despite respondent admitting to "some" damages in the form of "interest" in their reply to petitioners' initial motion), respondent puts a new horse on the track - a second dispositive motion - a "cross-motion" for summary judgment.

Ultimately, respondent's "cross-motion" (with a new defense, that there is not a "scintilla" of evidence of damages) creates a shortcut to the finish line to whittle away damages; absolving respondent of the same gated, sharp toothed burden carried by any moving party in a motion for summary judgment. In the end, respondent broke their promise, executed in front of a federal court and left the injured party with one dollar – which may not even buy lunch in a Quizno's franchise.

This case suggests continued confusion within the Courts as to the standard relating to summary judgment motions, certainly as to the shift of burden, benefit of doubt and inferences from the evidence when an initial motion, is then met with a "cross-motion." The very fact that the Tenth Circuit came up with a different amount of damages as the U.S. District Court ... a difference of 969% ... certainly confirms a genuine dispute as to the material fact of the "amount" of damages, for trial.

At first glance, this may appear to be a garden-type contract case; however, a large proportion of the property of the world exists in contracts. – *Legal Tender Case,* 110 U.S. 421, 451. Contracts seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow-man. They are the springs of business, trade and commerce. Without them, society could not go on. – *Swayne: Farington v. Tennessee*, 5 Otto 679, 682 (95 U.S.). The franchise agreement, tardily sent, was not the same as a "valid" franchise agreement negotiated for ...just as a barren cow is substantially a different creature than a breeding one – she was not in fact the animal, or the kind of animal, the plaintiffs intended to buy. – Allen B. Morse, *Sherwood v. Walker,* 66 Mich. 568, 577 33 N.W. 919 (1887).

The relief sought in this petition is consistent with Fed. R. Civ. P. 56(d) to ascertain what material facts (i.e. admissibility of evidence, contractual intent and law, controlling law related to damages, ability to cure a material breach and fraudulent intent) are actually in good faith controverted, remanding this case for a trial on damages.

In support of this petition, petitioners rely on the landmark opinions of this U.S. Supreme Court. Particularly, in 1986, then Justice, now Chief Justice Rehnquist delivered the opinion of this U.S. Supreme Court, regarding Rule 56, noting that the language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Justice Rehnquist wrote that:

> "[I]n such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Justice Rehnquist, however, also noted that the nonmoving party need <u>not</u> produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Justice White, in concurring with the opinion, added that it is not enough to move for summary judgment with a conclusory assertion, such as respondent did, that the plaintiff has no evidence to prove his case. Justice Brennan, although dissenting, echoed that:

> [a] conclusory assertion that the nonmoving party has no evidence was insufficient ... and, such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Yet, in this case, the Tenth Circuit affirmed granting respondent's motion for summary judgment, although Quizno's did not appeal the damages of $969.86 they argued for, by finding a "lack of proof" as to petitioners' damages. The Tenth Circuit errs in that minimal damages, even "interest" damages constitutes damages, thereby meeting all essential elements of petitioners' claim. A "material" breach of contract cannot be found "immaterial" because the amount of damages is in dispute.

The issue and law of damages are overwhelmingly complex. To retard the dialogue, and subsequently the evolution of contractual law related to damages, by simply stating no damages can be recovered for a business just contemplated is in contradiction to other precedence that damages can be recovered relating to the "expectancy" of the Agreement when executed. In particular, as petitioners were former Area Directors, they were qualified lay witnesses to testify as to their loss. *Quintana v. City of Westminster*, 8 P.3d 527 (Colo. Ct. App. 2000). And, other damages may apply, as this was a "Release" contract, materially breached, respondent cannot claim the benefit of a contract when [they] were first to violate its terms. *In re Country World Casinos, Inc.*, 171 F.3d 1146 (10th Cir. 1999).

In sum, other Circuit Courts have settled that when considering "cross-motions" for summary judgment, the proper procedure is to assess merits of each summary

judgment motion *independently* because each party, as movant for summary judgment bears the burden of establishing that no genuine issue of material facts exists. Moreover, the fact that one party fails to satisfy that burden on its own motion does not automatically indicate that opposing party has satisfied its burden and must be granted summary judgment on other motion. *See Clarkson v. Town of Florence* 198 F.Supp.2d 997 (ED Wis 2002).

Concurrently, respondent's conclusory assertions in their motion, that there was no evidence, must bear the same "stringent" burden of persuasion imposed on a moving party by Rule 56. If there is "any" evidence in the record, from "any" source from which a reasonable inference in petitioners' favor may be drawn, Quizno's, as moving party, simply should not have obtained a summary judgment. *Celotex* quoting *Matsuihita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

## II. THE TENTH CIRCUIT'S DECISION "STRAIGHT-JACKETS" A *PRO SE* LITIGANT TO RESPOND TO A "CROSS-MOTION" FOR SUMMARY JUDGMENT.

In 1986, in another landmark opinion, delivered by Justice White, this U.S. Supreme Court provided additional guidance relating to the evidence of the nonmoving party to avoid summary judgment. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court concluded that the evidence of the nonmoving party is deemed true and all "justifiable" inferences are drawn in his favor; he need only present evidence from which a jury might return a verdict in his favor; and credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Id. at 255; 257.

The Court, further, noted if reasonable minds could differ as to the import of the evidence, a summary judgment verdict should not be directed and that the standard mirrored the standard for a directed verdict, which is that, there can but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, quoting *Brady v. Southern R. Co.*, 320 U.S. 476, 479 (1943).

Again, in this case, both the Tenth Circuit and the U.S. District Court came up with differing "amounts" of damages, using differing controlling jurisdictional law – proving that there was "more than one" reasonable conclusion related to damages. Whatever the "amount" of damages, may or may not be - petitioners hold that they had the right to be heard as to the "amount" of damages, if they failed in their initial motion.

Again, although petitioners produced their depositions, their federal income tax returns, a notarized Declaration of Income demonstrating a loss, accompanied by federal form 1065 with itemized expenses, all submitted under the Federal Rule 11 standard, the Tenth Circuit somehow found that the evidence "fell short," in utter contradiction from the guidance given by *Anderson*. As petitioners shifted to the nonmoving party in responding to Quizno's "cross-motion," so should have the inference of evidence shifted, to now favor petitioners.

Admittedly, petitioners had the burden of proof at trial to prove damages. However, Rule 56 required that they produce only "enough" evidence, that a jury could find in their favor to prove a genuine dispute. The Tenth Circuit and the District Court, mistakenly looks for something more than what is required of Rule 56. If petitioners' notarized Declaration is not "enough," petitioners, as any pro se

litigant, are hopelessly shackled. As Justice Rehnquist noted, the last two sentences of Rule 56(e) were added, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. Justice Rehnquist, further noted:

> "[t]hat the summary judgment procedure is to be properly regarded as an integral part of the Federal Rules as a whole." *Celotex Corp. v. Cattrett,* 477 U.S. 317 (1986).

Although technically not labeled an "Affidavit," when submitted under the Federal Rule 11 standard, certainly the Declaration and pleadings met the test of "sufficient" evidence. That the breach was, or could be cured by the unreasonable and untimely delivery of the "invalid" franchise agreement (when all authorities agree a "cure" must be reasonably timely); that petitioners were under no obligation to accept the spoiled fruits of their Agreement; and that other damages naturally flowed and applied; now are all genuine issues - not to be fought out in written pleadings - but for the even-handed forum of trial.

In 1944, this Supreme Court recognized that the draftsmen of Rule 56 did not intend to cut off a litigant's right to a trial before the appropriate fact-finder if triable issues remained unresolved after the pleadings were closed and pretrial discovery had. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). In 1986, this Supreme Court directed the Court of Appeals to make an adequacy of the showing made by a party in opposition to a motion if reduced to admissible evidence. In this case, respondent not only failed in its burden of "there was no evidence" of damages, but, in acknowledging even "interest" damages and compelling petitioners to come forward with their income taxes,

depositions and certification from the State – essentially, negated their own defense that there was no genuine issue to the material fact of damages.

In sum, this case presents an opportunity for this Supreme Court to preserve their landmark opinions and address the burden that must be *independently* met, along with the shift in inferences and benefit from the evidence in petitioners' favor, as they became the nonmoving party in a "cross-motion."

## III. THE TENTH CIRCUIT'S DECISION RAISES THE CONSTITUTIONAL QUESTION OF A CIVIL LITIGANT'S RIGHT TO BE SECURE IN THEIR PAPERS AND PROCEDUAL DUE PROCESS.

There should be little tolerance for any litigant, in any civil case, that uses an opposing party's personal papers (in this case, federal income tax returns) in any other manner than what those documents were "reasonably" ordered to be produced for. The record is overwhelmingly clear - the U.S. Magistrate ordered these documents to be used "at the time of trial" and petitioners complied, producing them for that reason. For respondent to put these papers into open record, unsealed, without "whiting-out" identification numbers from petitioners' W-2's, military and business papers, in their reply brief where petitioners had no fair opportunity to respond and making those papers vulnerable to identity theft in this electronic age is a tactic that the U.S. District or Tenth Circuit Courts should not ignore, much rather reward in granting respondent's motion.

If a citizen cannot come to civil litigation, without fear of their rights being compromised, the Courts risk losing all honor, rightfully deserved and given them. What a person

knowingly exposes to the public, even in his own home or office, is not a subject of the Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. The test for determining whether the privacy interest is paramount is, *first*, that a person has exhibited an actual expectation of privacy and, *second*, that the expectation be one that society is prepared to recognize as reasonable. *Mancusi v. DeForte*, 392, U.S. 364, 368 (1968).

In sum, it was reasonable to expect to produce papers to be used at the time of trial, but to put such papers into open record, unsealed, not as so ordered, and with no attention by the Courts to the timely objections that were made, seemingly is not reasonable.

Equally, the question arises whether or not it is proper to grant a motion for summary judgment, when the opposing party did not conduct full discovery. Clearly, the two go hand-in-hand and this Court has always upheld that technical pleading errors should not be fatal in *pro se* cases.

Certainly, the questions raised by the U.S. District Court in seeking the documents it sought, that were submitted but could not be found, could have justly been answered in a hearing, reciprocal to that afforded the respondent. When resolving discovery disputes, the Supreme Court construes the rules of civil procedure liberally to effectuate the full extent of their truth-seeking purpose. See *Corbetta v. Albertson's Inc.*, 875 P.2d 718 (Colo. 1999).

In sum, in almost every setting, where important decisions turn on questions in fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Whenever necessary, it must give parties the opportunity to be heard

respecting the justice of the judgment sought. *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884).

## IV. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS U.S. SUPREME COURT RELATED TO A *PRO SE* LITIGANT'S RIGHT TO AMEND THE COMPLAINT.

Neither the U.S. District Court nor the Tenth Circuit recognize one very important factor in their opinions denying leave – the deadline to amend the pleadings was vacated by the U.S. Magistrate's first recommendation for dismissal. It is fundamentally unjust to hold petitioners to a deadline to amend the Complaint that had been previously vacated by the U.S. Magistrate, when no new deadline was created.

In sum, petitioners relied on the opinion of this U.S. Supreme Court that advised that leave is to be freely given and the Court should give pro se litigant the benefit of a liberally construed Complaint, in the spirit embodied in Rule 8(f) and 15, where subsequent proceedings reveal that ambiguous fragments in the Complaint represented the heart of litigant's concern; and where the context makes clear litigant's essential grievance, the Complaint's additional invocation of general legal principles need not detour the Court from resolving that which the litigant himself has shown to be his real concern. *See Beaudett* v. *Hampton*, 475 U.S. 1088 (1975).

Petitioners did not move to the U.S. District Court seeking a windfall; they came under circumstances created by the respondent. Petitioners come to this Supreme Court, thankful for the occasion and fully respectful of the liberties

and freedoms of these United States of America that allows them to do so, *pro se*.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: March 25, 2005

Elizabeth Mollinger-Wilson
Lt. Colonel Robert Wilson, USMC-Ret.

*Petitioners Pro Se*

12017 Vivacite Drive
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## APPENDIX A

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed January 21, 2005]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**AMENDED FINAL JUDGMENT**

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a)(l); and furthermore in accordance with the Order filed by Judge Edward W. Nottingham on January 12, 2005, the following AMENDED FINAL JUDGMENT is hereby entered.

1. Judgment is entered in favor of plaintiffs Elizabeth Mollinger-Wilson and Lt. Colonel Robert E. Wilson, USMC (Ret.) and against defendant the Quizno's Franchise Company in the nominal amount of one dollar; and

2. Plaintiffs shall have their costs as previously awarded in the amount of $822.88.

Dated this 21st day of January, 2005.

APPROVED BY THE COURT:

/s/ _____
EDWARD W. NOTTINGHAM
United States District Judge

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**No. 04-1131**

**[Filed December 30, 2004]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson; Robert E. Wilson, Lt. Colonel, USMC-Ret., *Plaintiffs-Appellants*, | ) |
| v. | ) |
| Quizno's Franchise Company, *Defendant-Appellee*. | ) |

**Appeal from the United States District Court for the District of Colorado**

Before LUCERO, MCKAY, and PORFILIO, Circuit Judges.

This matter is before the court on appellants' petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellants have been reviewed by the members of the hearing panel, who conclude that the

original disposition was correct. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to which the case was submitted, the suggestion rehearing en banc was transmitted to all judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Appellants' petition for rehearing with suggestion for rehearing en banc is DENIED. Any other pending motion in this case is DENIED.

Entered for the Court: PATRICK FISHER, Clerk

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## APPENDIX C

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

**No. 04-1131**

**[Filed December 3, 2004]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson; Robert E. Wilson, Lt. Colonel, USMC-Ret., *Plaintiffs-Appellants*, | ) |
| v. | ) |
| Quizno's Franchise Company, *Defendant-Appellee*. | ) |

**Appeal from the United States District Court for the District of Colorado**

Before LUCERO, MCKAY, and PORFILIO, Circuit Judges.

OPINION: PORFILIO, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.

App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Pro Se plaintiffs Elizabeth Mollinger-Wilson and her husband Robert E. Wilson appeal the decision of the district court to grant them partial summary judgment and nominal damages in their breach of contract claim against defendant Quizno's Franchise Company (Quizno's). In the district court, plaintiffs had moved for summary judgment, and defendant had filed a cross-motion for summary judgment on damages. Plaintiffs' motion was granted in part and denied in part; defendant's motion was granted. Additionally, plaintiffs appeal the district court's decision in the same document to deny their motion to compel discovery and to deny them leave to amend their complaint five months after they had filed for summary judgment.

The federal district court heard this case under diversity jurisdiction 28 U.S.C. § 1332(a)(1), and plaintiffs' breach of contract claim was controlled by Colorado law. We exercise jurisdiction over the final order of the district court pursuant to 28 U.S.C. § 1291, and we afffirm all of the decision but how the district court calculated nominal damages under Colorado law.

*Background*

Because the critical issue in this case was plaintiffs' lack of proof on damages, we need describe the extensive factual background of the case only briefly. Plaintiffs represented Quizno's in specific parts of the Rocky Mountain region. In January 2000, Quizno's terminated its contract with the plaintiffs. Plaintiffs brought suit against Quizno's, and as part of the settlement, Quizno's agreed that

> As consideration for [plaintiffs] relinquishing [their] rights ..., [Quizno's] shall pay [plaintiffs] the amount of $57,859, payable within three (3) business days from the date the [Termination] Agreement is fully executed by the Parties, plus one (1) franchise agreement, substantially equal to [Quizno's] present form franchise agreement and valid for 40 months from the effective date of the [Termination] Agreement, which the [plaintiffs] may use in the Territory or which the [plaintiffs] may sell to a third-party, subject to Quizno's approval of the third-party as a qualified Quizno's franchisee .... The Parties hereby agree that payment of the Termination Fee constitutes payment in full of any amounts owed to [plaintiffs] by [Quizno's] in connection with the Territory.

R. Vol. 1, Doc. 1, Ex. 1 at 1 [hereinafter Termination Agreement]. The parties signed the Termination Agreement on February 28, 2000.

Although Quizno's paid plaintiffs the sum that they were owned within three days, plaintiffs requested delivery of the promised franchise agreement on March 15, 2000, and Quizno's did not deliver that agreement until January 5, 2001. Plaintiffs subsequently brought this suit for breach of the Termination Agreement. Plaintiffs argue that, under the wording of the contract, they were due delivery of the franchise agreement within three days of when the Termination Agreement was signed, or, in the alternative, within a reasonable time afterwards. Quizno's disputes plaintiffs' interpretation of the Termination Agreement, asserting that the three-day period applied only to the delivery of the money, and not to the delivery of the franchise agreement. In the alternative, Quizno's asserts that it

complied with the Termination Agreement by delivering the "substantially equal" franchise agreement within a reasonable period of time. *See id.*

The district court referred the case to a magistrate judge under 28 U.S.C. § 636(b)(1)(B). The magistrate judge found that, under a plain reading of the Termination Agreement, the three-day requirement for delivery applied only to the sum Quizno's was to pay plaintiffs, and not to the franchise agreement. The Termination Agreement was thus ambiguous about when the franchise agreement was to be delivered, and Colorado law implied that Quizno's had a "reasonable time" to perform. R. Vol. III, Doc. 119 at 7 (citing *Colo-Tex Leasing, Inc. v. Neitzert*, 746 P.2d 972, 975 (Colo. Ct. App. 1987)). Because the franchise agreement was to be valid for forty months after the date of the Termination Agreement, the magistrate judge concluded that it was unreasonable for Quizno's to have delayed eleven months to deliver the agreement.

Although the magistrate judge determined that there had been a breach of contract, he found that plaintiffs had not produced sufficient evidence of damages as a result of the breach. Plaintiffs made several arguments to establish damages, and the following they reassert, *inter alia*, on appeal.[1] We describe those claims here and adopt by

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[1] Plaintiffs appear not to have repeated their arguments on appeal that they incurred damages from the taxes they paid on the sum conveyed in the Termination Agreement, and that they lost additional revenue in developing their territory for Quizno's under their original agreement with the company. *See generally Aplt. Br.* The magistrate judge explained in his report and recommendation that taxes paid on settlements do not naturally follow from the breach of settlement contracts under the law, R. Vol. III, Doc. 119

incorporation the magistrate judge's accurate responses to them. First, plaintiffs claimed that they had to forego other business opportunities to work with Quizno's. They submitted declining income tax returns from 1995 through 2000 to illustrate their loss. But, as the magistrate judge found, nothing in the record tied plaintiffs' declining income to Quizno's failure timely to deliver the franchise agreement after February 28, 2000. Second, plaintiffs claimed that they had lost profits that should be generally based on the average unit volume for the operation of Quizno's restaurants. But lost profit awards are not permitted under Colorado law if "either the amount of the profits that would have been earned or the fact that the plaintiff would have earned them is too speculative to determine." R. Vol. III, Doc. 119 at 18 (quoting *Republic Nat'l Life Ins. Co. v. Red Lion Homes, Inc.*, 704 F. 2d 484, 489 (10th Cir. 1983)). Third, plaintiffs argued that they lost the franchise itself as an investment valued between $250,000 to $350,000, but set forth no factual basis for this evaluation of its value.

Accordingly, the magistrate judge recommended awarding partial summary judgment to plaintiffs, but granting them only nominal damages. He noted that, as part of the record, plaintiffs had been willing to sell the franchise agreement to a third party for $15,000. The magistrate judge therefore

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at 14 (citing *Western Union Telegraph Co. v. Trinidad Bean & Elevator Co.*, 267 P. 1068, 1069 (Colo. 1928)), and that the language of the Termination Agreement had specifically provided that neither party could have "any further obligation or duties, however characterized or described, with respect to each other for obligations related to the Territory, except as set forth in this [Termination] Agreement." R. Vol. III, Doc. 119 at 14 (quoting the Termination Agreement); *see also* Termination Agreement, R. Vol. I, Doc. 1, Ex. 1 at 1.

recommended that the calculation of nominal damages be interest on the $15,000 from the time that plaintiffs requested the franchise agreement from Quizno's on March 15, 2000, to when Quizno's delivered the agreement on January 5, 2001. The district court adopted the magistrate judge's report and recommendation, and it entered judgment for $969.86, which represented the legal rate of interest on $15,000 for that period of time.

Additionally, the district court denied plaintiffs' motion to compel discovery and leave to amend their complaint. Regarding plaintiffs' motion to compel, the district court held that plaintiffs' request to take additional depositions was untimely because the deadline for discovery had expired, that plaintiffs had not employed previous opportunities to take depositions, and that plaintiffs had presented inadequate proof that additional depositions were necessary. Regarding plaintiffs' motion for leave to amend their complaint, the district court found that plaintiffs had failed to show good cause for amendment, that plaintiffs' proposed amendment had failed to conform to the evidence presented as they asserted, and that there would be significant prejudice to defendant in permitting amendment at the eleventh hour.

*Standard of Review*

We review a district court's decision regarding summary judgment *de novo*, applying the same standard as the district court. *Hollingsworth v. Hill,* 110 F.3d 733, 737 (10th Cir. 1997). We view the evidence and any inferences therefrom in light most favorable to the non-moving party, *J.B. v. Washington County*, 127, F.3d 919, 923 (10th Cir. 1997); and will affirm a grant of summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," *id.* (quoting Fed R. Civ. P. 56(c))

We review decisions regarding leave to amend pleadings for abuse of discretion. *Foman v. David*, 371 U.S. 178, 182 (1962); *Calderon v. Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999). And we have generally held that decisions regarding discovery are within the sound discretion of the district court. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995) (evaluating motion to compel); *GWN Petroleum Corp. v. OK-Tex Oil & Gas, Inc.*, 998 F.2d 853, 858 (10th Cir. 1993) (articulating the general standard).

*Discussion*

On appeal, plaintiffs argue (1) that "common sense" suggests that their damages from the late delivery of the franchise agreement exceed the district court's award of $969.86; (2) that the franchise agreement should have been delivered within three days of when they signed the Termination Agreement; (3) that the franchise agreement that they received was not, as the Termination Agreement required, "substantially equal" to Quizno's form franchise agreement at the time the Termination Agreement was signed; (4) that they should not bear the burden of proving their own damages even with the arguments they had asserted; (5) that they should be entitled to trial on the issue of damages; (6) that the magistrate judge and the district court improperly calculated nominal damages by looking beyond the four corners of the Termination Agreement to find evidence that plaintiffs were willing to sell their franchise to a third party for $15,000; and (7) that the district court should have granted their motions to compel additional discovery from

Quizno's and to amend their complaint because they were pro se litigants.

Although plaintiffs are pro se and we construe their pleadings liberally, *Hunt v. Uphoff*, 199 F.3d 1220, 1223 (10th Cir. 1999), we will not construct legal theories on their behalf, *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). We thus do not develop plaintiffs' first objection that "common sense" suggests that their damages exceeded the amount awarded by the district court.

Plaintiffs' second objection is without merit because we hold that the magistrate judge and district court properly read the plain language of the Termination Agreement not to require delivery of the franchise agreement within three days. According to the Termination Agreement, Quizno's owed "[plaintiffs] the amount of 57,859, payable within three (3) business days from the date the [Termination] Agreement is fully executed by the Parties, plus one (1) franchise agreement, substantially equal to [Quizno's] present form franchise agreement and valid for 40 months from the effective date of the [Termination] Agreement ...." R. Vol. I, Doc. 1, Ex. 1 at 1. The language of the Termination Agreement makes clear that it is "the amount of $57,859" that was to be "payable within three (3) business days." *Id.* Delivery of the franchise agreement was promised, but the Termination Agreement did not specify the time frame in which it had to be delivered.

Plaintiffs' third objection is that the franchise agreement they received from Quizno's was not "substantially equal" to the form franchise agreement in effect at the time the parties executed the Termination Agreement. Plaintiffs' arguments center on whether four changes (different provisions regarding sublease guarantees and advertising cooperatives,

the fact that the agreement reflects Quizno's change from a private to a public company, and a transfer fee) are material distinctions from the form of the franchise agreement available at the time the Termination Agreement was signed. The magistrate judge reviewed each of plaintiffs' arguments to find that the franchise agreement delivered substantially complied with the requirements of the Termination Agreement, and the district court agreed.

The district court, though, focused more on the fact that there had been a breach – and we would add that it matters not whether the breach was the result of the franchise agreement's untimely delivery or of the substantive content of the document delivered – and noted that plaintiffs had failed to establish damages. In the words of the district court:

> Although the magistrate judge suggests a finding that defendant breached a promise to furnish a franchise agreement within a reasonable time, plaintiffs are not satisfied. First they repeat their contention that the agreement required defendant to furnish the franchise materials within three days. They also imply that this erroneous interpretation somehow affects the scope of their damages. Second, they argue that the franchise agreement tended was not [in] the form contemplated by the parties' contract. Third, they insist that they were not required to pay the transfer fee which defendant demanded. This is a matter of looking at the written contracts, which the court has done. The court agrees with the magistrate judge concerning interpretation of the contracts. By operation of law, defendant was obliged to tender a

> franchise agreement within a reasonable time, and it breached that promise.
>
> In considering the question of damages ..., [however, plaintiffs are] obliged to establish, by competent proof under applicable legal standards, that there is genuine dispute of material fact which must be resolved at trial .... The court has conducted the requisite *de novo* review of plaintiffs' allegations and evidence, their objections, the issue, and the recommendation. Based on this review, I have concluded that the recommendation [of the magistrate judge] is a correct application of the facts and the law. Accordingly, ... [t]he recommendation is ... ACCEPTED.

R. Vol. III, Doc. 12 at 6-7. We agree with the district court's focus on the fact that there was a breach and there should then be an examination of damages. We decline to examine the differences between the versions of franchise agreements available because that discussion would do little to advance resolution of this case, but instead we follow by asking the dispositive question whether plaintiffs have proven damages from any breach of contract.

Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Here, according to the Colorado Supreme Court:

> It has long been the law in Colorado that a party attempting to recover on a claim for

> breach of contract must prove the the following elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for non-performance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff.

W. Distrib. Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992) (internal citations omitted).

Because plaintiffs are the party attempting to recover on a claim for breach of contract, they have the burden to prove the elements of their claim. *See id.* This disposes of plaintiffs' fourth objection that they should not bear the burden of proving their own damages. And, upon de novo review, we hold that plaintiffs have failed to carry their burden to prove that they incurred damages as a result of either the untimely delivery, or arguably the unsubstantially equal content, of the franchise agreement. We have reviewed the record and evaluated all the evidence presented. The magistrate judge and the district court have accurately and thoroughly explained why plaintiffs have failed to establish proof of damages. None of plaintiffs' arguments challenge that basic finding, and we incorporate the magistrate judge and district court's explanations by reference here. Plaintiffs' objection to the form of the contract presented is therefore not relevant; and plaintiffs' fifth objection that summary judgment was not appropriate and that they should have been entitled to go to trial is without merit.

Plaintiffs' sixth objection, that the magistrate judge and the district court improperly calculated the amount of nominal damages by looking beyond the four corners of the Termination Agreement to note evidence in the record that

plaintiffs were willing to sell their franchise for $15,000, is interesting because it reopens the issue of how nominal damages should be awarded under Colorado law.

Colorado is specific that nominal damages are $1 – not more, not less. The Colorado courts have stated that "one dollar is nominal damages, as a matter of law." *Colo. Inv. Servs., Inc. v. Hager*, 685 P.2d 1371, 1375 (Colo. Ct. App. 1984) (quotation o mitted); *see also id.* ("If you find in favor of the plaintiff, but do not find any actual damages, you shall nonetheless award him nominal damages *in the sum of one dollar.*") (quotation and citation omitted) (emphasis in quotation). And those courts have remanded for a trial court that had awarded more in nominal damages "to modify the award of nominal damages to the trivial sum of one dollar." *See, e.g., id.* (quotation omitted); *accord Colo. Prac., Civil Trial Practice* § 12.10 (2d ed.) (West Supp. 2004) ("Where the non-breaching party fails to prove the amount of the loss, the non-breaching party may still recover nominal damages ... [in the amount of] $1.00."); *id.* ("[T]he amount of nominal damages which can be recovered is $1.00.").

We recognize irony in the result that plaintiffs should challenge the calculation of nominal damages as too low, and we remand for the district court to reduce the award to $1. But that is the correct way to have awarded nominal damages under Colorado law, and plaintiffs have asked us specifically to examine the issue of how those damages were calculated. Accordingly, we remand for the district court to modify its award of nominal damages to comport with Colorado's requirement that nominal damages be one dollar.

Finally, plaintiffs' seventh objection, that the district court should have granted their motions to compel additional discovery from Quizno's and to amend their complaint

because, as pro se litigants, they should be given another chance to comply with judicial requirements, is without merit. "[*P*]*ro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure." *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994). The district court the basis of its decision in its opinion, and plaintiffs do not challenge the court's fundamental reasoning. We hold that the district court did not abuse its discretion in making those decisions.

*Conclusion*

We AFFIRM the judgment of the district court in all respects except for its calculation of nominal damages. On this point, we REVERSE the judgment of the district court, and we REMAND for modification of nominal damages to the amount of one dollar. All other motions are DENIED as moot.

Entered for the Court.

JOHN C. PORFILIO, Circuit Judge.

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed March 26, 2004]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**FINAL JUDGMENT**

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

1. Pursuant to the written Order Accepting Magistrate Judge's Recommendation filed by Judge Edward W. Nottingham on March 26, 2004:

a. The recommendation is (#119) is ACCEPTED.

b. Plaintiffs' motion for summary judgment (#54) is granted in part and denied in part. It is granted on the issue of liability for breach of contract, and defendant is liable to plaintiffs for breach of promise to furnish plaintiffs a franchise agreement within a reasonable time. In other respects, the motion is denied.

c. Defendant's motion for summary judgment on damages (#90) is granted, and plaintiffs shall be awarded nominal damages, as suggested by the magistrate judge.

d. Judgment is entered in favor of plaintiffs Elizabeth Mollinger-Wilson and Lt. Col. Robert E. Wilson, USMC (Ret.) and against defendant the Quizno's Franchise Company in the nominal amount of $969.86, calculated as interest at the legal rate of eight per cent per annum (as provided in Colo. Rev. Stat. § 5-12-101 [2003]) on the sum of $15,000 for the period from March 15,2000 (when plaintiffs claim they requested the franchise agreement) through January 5, 2001, when the agreement was delivered.

2. Plaintiffs shall have their costs upon the proper filing of a Bill of Costs within ten days of this Final Judgment.

3. This judgment shall bear interest at the rate of 1.18%.

Dated this 24 day of March, 2004.

APPROVED BY THE COURT:

/s/_____
EDWARD W. NOTTINGHAM
United States District Judge

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed March 26, 2004]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**ORDER ACCEPTING MAGISTRATE JUDGE'S RECOMMENDATION**

This matter is before the court on the "Recommendation of United States Magistrate Judge" filed September 30, 2003. Addressing motions for summary judgment filed by each side, the magistrate judge recommends that plaintiffs' motion for summary judgment be granted, in part, on the question of defendant's liability for breach of contract and that the court find defendant liable for breach of its promise to furnish plaintiffs with a franchise agreement within a reasonable

amount of time. He also recommends, however, that plaintiffs be awarded only nominal damages because theyhave demonstrated no triable factual issue concerning actual damages. Plaintiffs have objected to the recommendation on several grounds. Also pending are their objections to separate orders of the magistrate judge (1) denying plaintiffs' motion to amend their complaint and (2) denying their motion to compel certain discovery but granting their motion to extend their time for responding to defendant's summary judgment motion.

*1. Standard of Review.*

*a. Review of Magistrate Judge's Recommendations and/or Orders*

The standard of review which this court employs in considering a magistrate judge's recommendation depends upon whether the motion decided is viewed as dispositive or non-dispositive. Under Rule 72(a) of the Federal Rules of Civil Procedure, a district court may reverse a magistrate judge's decision on a non-dispositive matter only if the decision is found to be "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). Under the clearly erroneous standard of review, the magistrate judge's findings should not be rejected merely because the court would have decided the matter differently. *Anderson v. City of Bessemer*, 70 U.S. 564, 573, 105 St. Ct. 1054, 1511 (1985). Rather, the district court must affirm the decision of the magistrate judge unless the district court, "on the entire evidence [,] is left with the definite and firm conviction that a mistake has been committed." *Id.* at 1454 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 542 [1948]). The court may apply this standard of review to the denial of the motion to amend and the motion to compel

discovery, since those motions are among those which the statute permits the magistrate judge to resolve and the magistrate judge's orders here do not effectively dispose of the case. *See* 28 U.S.C.A. § 636(b)(1)(A).

For dispositive motions such as the motions for summary judgment, however, a district court assessing a magistrate judge's findings of fact and recommendations for disposition must make a "de novo determination of those portions of the report ... to which objection is made." *See* 28 U.S.C.A. § 636(b)(1) (West 1993); Fed. R. Civ. P. 72(b). "When conducting de novo review, the district court makes its own determinations of disputed issues and does not decide whether the magistrate's proposed findings are clearly erroneous." *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989). The court will apply this standard of review in considering the recommendations about the summary judgment motions.

*b. Summary Judgment Standard*

Under rule 56(c), the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *Concrete Works, Inc. v. City of County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matters. *Concrete Works, Inc.*, 36 F.3d at 1518

(citing *Celotex Corp.*, 477 U.S. at 325, 106 S. Ct. at 2554). The nonmoving party may not rest solely on the allegations in his or her pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553; Fed. R. Civ. P. 56(e). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-A-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 [10th Cir. 1990]).

*2. Court's Ruling on Plaintiffs' Objection to Orders Denying Plaintiffs' Motion to Compel Discovery and Motion to Amend Complaint.*

*a. Motion to Compel*

In his written ruling denying plaintiffs' motion to compel, the magistrate judge stated three reasons for the ruling. First, the request to take depositions was untimely, the discovery deadline having expired and plaintiffs have passed up several opportunities to take depositions. Second, the magistrate judge found that plaintiffs had presented inadequate proof that the request for late depositions was caused by defendant's dilatory disclosures of information which plaintiffs needed to take the depositions. Third, the magistrate judge concluded that plaintiffs had failed to support their motion to compel more complete responses to written discovery because they had failed to set forth the discovery request and the allegedly inadequate response, in violation of local rule 37.1.

In objecting, plaintiffs argue that defendants sent them some forty-three pages of materials after expiration of the

discovery deadline. They allege that these materials should have been disclosed earlier, either voluntarily or in response to their discovery requests. They acknowledge that their motion was untimely and failed to attached the disputed discovery and responses, but they claim that they furnished this material elsewhere – although they do not bother to tell this court when and where.

It is plaintiffs' burden to satisfy this court that the magistrate's judge's ruling was clearly erroneous or contrary to law, and they have failed to carry that burden. As an initial matter, they have failed to inform the court concerning the significance of the documents which were allegedly disclosed late. The court does not know whether the documents fall into the category of those which should have been voluntarily disclosed without a request under Fed. R. Civ. P. 26(a). It does not know whether they fell within a discovery request by plaintiffs or when the request was made. It does not know whether the motion to compel was itself timely or whether it was filed only as an excuse to delay the necessity of responding to defendant's summary judgment motion. Most critically, plaintiffs fail to tell the court enough about the documents to permit a determination that plaintiffs needed them in order to justify otherwise untimely depositions. Plaintiffs' omissions parallel their failure to set forth the discovery request and the allegedly inadequate responses, which they now seek to excuse by claiming that they already furnished that material – although they still do not say where. To paraphrase Judge Posner, judges are not like pigs, scouring the entire record for filings and materials that parties claim are there somewhere. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). There is no basis here for concluding that denial of the motion to compel was clearly erroneous or contrary to law.

*b. Motion to Amend Complaint*

In denying the motion to amend, the magistrate judge properly looked to rule 16, not rule 15, since the deadline for amendments and other deadlines established in the rule 16 scheduling order had passed. He therefore required a showing of "good cause" for the amendment to the scheduling order. He also properly weighed inconvenience and prejudice to defendant in deciding whether to permit an eleventh-hour amendment after discovery had been concluded and motions for summary judgment had been filed. I have reviewed each alleged instance in plaintiffs' objection where they claim that the amendment merely conforms to the evidence. It does nothing of the sort. Pleadings, brief and motions are not evidence. Even if they were, the statements in those papers do not fairly portend a potential claim for fraudulent misrepresentation. Most importantly, plaintiffs never come to grips with a grips with a critical aspect of the magistrate judge's ruling – their own failure to show why, exercising due diligence, they could not have filed the motion to amend earlier. Denial of the motion was proper.

3. Court's Ruling on Summary Judgment Recommendation.

Although the magistrate judge suggests a finding that defendant breached a promise to furnish a franchise agreement within a reasonable time, plaintiffs are not satisfied. First they repeat their contention that the agreement required defendant to furnish the franchise materials within three days. They also imply that this erroneous interpretation somehow affects the scope of their damages. Second, they argue that the franchise agreement tendered was not on the form contemplated by the parties' contract. Third, they insist that they were not required to pay the transfer fee which defendant demanded. This is a matter of looking at the written

contracts, which the court has done. The court agrees with the magistrate judge concerning interpretation of the contracts. By operation of law, defendant was obliged to tender a franchise agreement within a reasonable time, and it breached that promise.

In considering the question of damages, the court reiterates part of the summary judgment standard set forth earlier. Defendant have moved for summary judgment on an issue as to which plaintiffs bear the burden of proof. Plaintiffs are therefore obliged to establish, by competent proof under applicable legal standards, that there is a genuine dispute of material fact which must be resolved at trial. Plaintiffs cannot simply rest on their pleadings, briefs, argument, or material which would not be admissible at trial. The court has conducted the requisite *de novo* review of plaintiffs' allegations and evidence, their objections, the issues, and the recommendation. Based on this review, I have concluded that the recommendation is a correct application of the facts and the law. Accordingly, it is ORDERED as follows:

1. The recommendation is (#119) is ACCEPTED.

2. Plaintiffs' motion for summary judgment (#54) is granted in part and denied in part. It is granted on the issue of liability for breach of contract, and defendant is liable to plaintiffs' for breach of promised to furnish plaintiffs a franchise agreement within a reasonable time. In other respects, the motion is denied.

3. Defendant's motion for summary judgment on damages (#90) is granted, and plaintiffs shall be awarded nominal damages, as suggested by the magistrate judge.

4. The clerk shall forthwith enter judgment in favor of plaintiffs and against defendant in the nominal amount of $969.86, calculated as interest at the legal rate of eight per cent per annum (as provided in Colo. Rev. Stat. § 5-12-101 [2003]) on the sum of $15,000 for the period from March 15, 2000 (when plaintiffs claim they requested the franchise agreement) through January 5, 2001, when the agreement was delivered.

5. Plaintiffs' objections to the magistrate judge's rulings on the motion to amend and the motion to compel are overruled, and those rulings stand as the orders of the court.

6. All other pending motions are DENIED as moot.

Dated this 24 day of March, 2004.

BY THE COURT:

/s/_____
EDWARD W. NOTTINGHAM
United States District Judge

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed September 30, 2003]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Entered by O. Edward Schlatter, United States Magistrate Judge

This matter is before the court on the plaintiffs' Motion for Summary Judgment, filed November 1, 2002 and defendant's Motion for Summary Judgment, filed February 18, 2003. Opportunity for response has been given with regard to both motions, and each party has done so. Pursuant to 28 U.S.C. §636, and Fed. R. Civ. P. 72(b), these matters have been referred to me for recommendation. The parties are

entitled to seek review or reconsideration of my recommendation by filing "objections" to my recommendation within ten days. An advisement of the right to appeal or object is attached to this Recommendation on a page which is entitled "Advisement Under Fed. R. Civ. P. 72."

## FACTUAL BACKGROUND

In their Complaint, filed on March, 2002, plaintiffs allege that defendant has breached a Termination and Release Agreement ("Termination Agreement") reached between the parties in a previous lawsuit. The prior litigation concerned defendant's termination of an Area Director Marketing Agreement ("ADMA") for alleged material breaches by the plaintiffs. A settlement was reached in that suit, and the Termination Agreement sets forth the terms of its resolution, providing among things, that:

> As consideration for [plaintiffs] relinquishing their rights under the ADMA, [defendant] shall pay [plaintiffs] the amount of $57,859, payable within three (3) business days from the date the [Termination] Agreement is fully executed by the Parties, plus one (1) franchise agreement, substantially equal to [defendant's] present form franchise agreement and valid for 40 months from the effective date of the [Termination] Agreement, which the [plaintiffs] may use in the Territory or which the [plaintiffs] may sell to a third-party, subject to [defendant's] approval of the third-party as a qualified [defendant's] franchisee ("Termination Fee"). The Parties hereby agree that payment of the Termination Fee constitutes payment in full of any amounts owed

to [plaintiffs] by [defendant] in connection with the Territory.

*Mollinger-Wilson, et al. v. Quizno's*, Civil Action No. 02-N-043, Docket #1, COMPLAINT (Attached Termination Agreement, p. 1). The Termination Agreement is dated February 28, 2000. *Id.*

Plaintiffs allege that defendant has breached this agreement because (1) defendant failed to send plaintiffs a franchise agreement until January 5, 2001, (2) the franchise agreement that was received was not "substantially equal to" the form franchise agreement in use at the time the Termination Agreement was executed, and (3) defendant now implies that a transfer fee would be payable in the event the franchise agreement was sold to a third-party. Defendant has denied the allegations.

Plaintiffs seek summary judgment, arguing that the clear language of the Termination Agreement establishes that the franchise agreement should have been provided to them 'within three (3) business days from the date the Agreement is fully executed by the Parties," or, pursuant to case law, within a reasonable time. They claim the franchise agreement was not provided to them for almost 11 months after the Termination Agreement was executed, in violation of the agreement's provisions and not within a reasonable time. Plaintiffs indicate that the franchise agreement contains new provisions related to advertising cooperative and sublease guarantees, causing the franchise agreement not to be substantially equal to the franchise agreements in effect at the time of the Termination Agreement. Finally, plaintiffs argue that defendant breached the Termination Agreement by insisting that a transfer fee would apply, despite language in the agreement to the contrary. Defendant has countered each

of the plaintiffs' arguments, arguing that the franchise agreement was provided within a reasonable time under the circumstances, that the agreement was substantially equal, and that under the definitional provisions of the franchise agreement, the term transfer includes sale and transfer.

Defendant has also filed a Motion for Summary Judgment, arguing that plaintiffs have failed to demonstrate "evidence" of damages for their claims. Defendant contends that plaintiffs' evidence of damages "consists of nothing more than speculative and conclusory testimony completely bereft of factual support." Plaintiffs' position is that the dispositive motion has been brought in bad faith, is a weak second attempt to make arguments that should have been made in response to their summary judgment motion, and in no way excuses the defendant's intentional breach of the franchise agreement. Plaintiffs contend that the defendant made no objection to the damages sought in their Complaint, nor made any claim that they failed to mitigate their damages, and therefore, the defendant has waived their position under this motion.

## DISCUSSION

### I. Standard of Review.

Summary judgment is appropriate if the record demonstrates no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson,* 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. *See* Celotex *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990); see, also, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The nonmoving party may not rest on its pleading, but must set forth specific facts. *See Applied Genetics*, 912 F.2d at 1241.

The court must view the record in a light most favorable to the party opposing the motion for summary judgment. *See Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. *See Anderson*, 477 U.S. at 250-51. "In response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252.

II. The Pending Motions For Summary Judgment.

The cause of action in this case is a breach of contract.

It has long been the law in Colorado that a party attempting to recover on a claim for breach of contract must

prove the following elements: (1) the existence of a contract, ... (2) performance by the plaintiff or some justification for nonperformance, ... (3) failure to perform the contract by the defendant, ... and (4) resulting damages to the plaintiff .... The "performance" element in a breach of contract action means "substantial" performance.

*Western Distributing Co., et al., v. Diodosio*, 841 P.2d 1053 (Colo. 1992) (citations omitted). Whether a party has substantially performed under a contract is determined by considering whether that party has materially failed to perform its obligations under the contract or deviated from the contract conditions "in triffling particulars," because a material failure to perform renders substantial performance impossible. *Id.* Two factors the courts should look to in determining whether an alleged failure to perform under a contract is material are (1) the extent to which an injured party would still obtain substantial benefit from the contract, and (2) the adequacy of compensation in damages for the breach. *Interbank Investments, LLC v. Vail Valley Consolidated Water District*, et al., 12 P.3d 1224, 1229 (Colo. Ct. App. 2000).

Under their Motion For Summary Judgment, plaintiffs contend that there exists no issue of fact that defendant failed to substantially perform under the Termination Agreement, thereby establishing a breach of contract for which they are entitled, as a matter of law, to judgment for the damages they suffered. In its Motion For Summary Judgment, defendant argues that even if a breach can be found in this case, the plaintiffs have failed to adequately support their alleged damages.

A. Did Defendant Fail To Perform Under the Termination Agreement?

1. Defendant failure to send plaintiffs a franchise agreement until January 5, 2001.

Plaintiffs argue that the clear language of the Termination Agreement establishes that the franchise agreement should have been provided to them in the same time frame that payment of settlement monies were to be made. However, the rules of grammar and contract interpretation, as well as simple logic, dictate that the phrase "payable within three (3) business days from the date the Agreement is fully executed by the Parties" is confined to the immediately preceding words, which were the amount of money to be paid. *See Illinois Bell Telephone Co. v. Reuben H. Daniel Corp.*, 595 F. Supp. 1192, 1200 (N.D. Ill. 1984) (under "last antecedent clause" principle of contract construction, qualifying phrase is generally confine (sic) to the last antecedent); *see, also, Cape Air Freight, Inc. v. United States*, 589 F.2d 478, 481 (10th Cir. 1978) (citing *T.I. McCormack Trucking Co. v. United States*, 251 F. Supp. 526, 532-33 (D.N.J. 1966)). Because the agreement is silent with regard to the time for performance in this regard, a reasonable time for performance is implied. *See Colo-Tex Leasing, Inc. v. Neitzert*, 746 P.2d 972, 975 (Colo. Ct. App. 1987) ("[I]f a contract does not fix the time for performance, the law presumes that it is to be performed within a time."). "[W]hat is a reasonable time is a matter of proof under all the conditions and circumstances surround the case." *Id.*

The Termination Agreement provides that the franchise agreement would be valid for 40 months from the effective date of the Termination Agreement. The parties are in agreement that the Termination Agreement was executed on

February 28, 2000, and that the franchise agreement was not sent to the plaintiffs until January 5, 2001. Plaintiffs argue that the almost 11 month delay in supplying the franchise agreement is unreasonable, and without justification, thereby establishing a breach. Defendant counters that it could not have legally executed a franchise agreement on February 28, 2000, or within three days thereafter, due to applicable franchise disclosure laws. According to the defendant, it would have had to first disclose plaintiffs with a Uniform Franchise Offering Circular, and then plaintiffs would have had to wait ten days after the disclosure to execute the franchise agreement. Mollinger-Wilson, Civil Action No. 02-N-0436, Docket #67, Response to Amended Motion for Summary Judgment, p. 8, n. 3. While the franchise disclosure laws may arguable have prevented the defendant from immediately providing the franchise agreement to the plaintiffs, defendant has failed to demonstrate how compliance with these laws raises a genuine question of fact that it was reasonable not to provide the agreement to the plaintiffs for a period of approximately 11 months.

Defendant does indicate that it expected the plaintiffs to contact it when they located a transferee, or decided to open a Quizno's Classic Subs Restaurant and had found a suitable location, and then it would promptly send the plaintiffs the necessary documents. However, the Termination Agreement sets forth no language, and defendant cites to none in it or any provision of the ADMA that survived the Termination Agreement, which places upon the plaintiffs a duty to contact the defendant in this regard. *Id.* at Docket #1, Complaint (Attached Termination Agreement).

Plaintiffs contend that even though they were not required to, they requested the franchise agreement during the final discussions when executing the Termination Agreement, and

on March 15, 2000, and in late September, 2000, through defendant's Denver counsel. *Id.*, at Docket #54, Plaintiffs' Amended Motion for Summary Judgment, pp. 11-12. Defendant appears to dispute at least the March 15, 2000, request, *see Id.* at Docket #83, Sureply to Amended Motion for Summary Judgment, p. 8, n.5, but raises no issue with regard to the other representations by the plaintiffs. Further, the Termination Agreement recognizes that plaintiffs may use the franchise agreement themselves, or sell it to a third party, subject to approval of the third party by the defendant. Therefore, plaintiffs were not required to locate a transferee before receiving the franchise agreement, since they could use the agreement themselves, and they could not reasonably have been expected to decide whether to use the franchise agreement themselves until the agreement was provided to them.

Finally, defendant appears to argue that since the plaintiffs had negotiated a longer time period in which to either transfer the franchise agreement or open a restaurant, i.e., 40 months from the effective date of the Termination Agreement rather than 12 months from the effective date of a franchise agreement normally required by the defendant, it was reasonable not to provide the plaintiffs with a franchise agreement for approximately 11 months. The simple fact that plaintiffs would have 40 months to transfer the franchise agreement or open a restaurant does not, without more, make it reasonable for defendant to take 11 months to provide them with a franchise agreement.

2. Defendant's franchise agreement form in effect January, 2001, versus defendant's franchise agreement form in effect in February 28, 2000.

The Termination Agreement provides that the franchise agreement to be provided to the plaintiffs would be substantially equal to the form in effect on the date of the Termination Agreement. Plaintiffs argue that the franchise agreement provided to them by the defendant in January, 2001, was not substantially equal to the form utilized by the defendant at the time of the execution of the Termination Agreement on February 28, 2000. Plaintiffs contend that the franchise agreement contained new provisions relating to advertising cooperative and sublease guarantees, and these changes together with the fact that the defendant had gone from a private company to a publicly traded company, caused the franchise agreement provided to them to be substantially different from that which would have been available in February, 2000. However, except for their conclusory statements that the franchise agreement was not substantially equal, plaintiffs provide no evidentiary matter in support of this argument in their motion. For example, plaintiffs represent that the differences in advertising co-op arrangements resulted in significantly greater dollars being contributed by a franchisee, Plaintiffs' Reply to Response to Amended Motion for Summary Judgment, Docket #72, but no substantiation of their position is presented.

A summary judgment is neither a method by which a party can avoid proving their case nor a clever procedure by which a claimant can shift to his adversary his burden of proof on one or more issues. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 14 (1969). "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no

opposing evidentiary matter is presented." Fed.R.Civ.P. 56 Advisory Committee Notes.

3. Payment of a transfer fee.

Plaintiffs contend that the defendant breached the Termination Agreement by insisting that a transfer fee applies to the franchise agreement they were provided under the Termination Agreement. Plaintiffs' position in this regard appears to be that under the contractual language of the Termination Agreement by which they would be provided a franchise agreement, "which the [plaintiffs] may use in the Territory of which the [plaintiffs] may sell to a third party," a "transfer" fee should only apply to a sale of the franchise agreement and no other form of transfer.

To satisfy their burden in this regard, plaintiffs have attached to their Amended Motion For Summary Judgment, as Exhibit #5, a single page from the 4-page Guideline For The Transfer Of a Quizno's Franchise, which has encircled the following language: [Plaintiffs do not identify this document, but it can be found in the record as an attachment to Exhibit A-6 to Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Docket #91].

> In addition to these items, a check to [defendant] for the transfer fee must be submitted, in the amount required by franchisee's franchise agreement (generally 25% of the current initial franchise fee).

The probative value of this evidence is not explained. The Termination Agreement itself contains no provision regarding transfer fees. The document supplied by the plaintiffs in support of their argument is a transfer guideline supplied to the plaintiffs for their review when the franchise agreement

was sent to the. While it does utilize the terms "buyer" and "purchase," the very first page of the document states, "[t]he following is an outline of the steps that must be followed with [defendant] to *sell or transfer* a franchise." Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Docket #91, Exh. A-6 (emphasis added).

The Termination Agreement does provide that the franchise agreement will be substantially equal to the form in effect on the date of the Termination Agreement. The defendant has provided evidence that the franchise agreement form in effect in February, 2000 and in January, 2001, both defined the term "transfer" to include "Franchisee's (or an owner's) voluntary, involuntary, direct, or indirect assignment, sale, give, or other disposition of any interest in: ...." Defendant's Response to Motion for Summary Judgment, Docket #67, Exh. A.

4. Conclusion.

In a nutshell, the language of the Termination Agreement provides that in consideration for plaintiffs' relinquishing their rights under the ADMA, the defendant was to pay a sum certain, plus one franchise agreement. Plaintiffs have failed to demonstrate that, as a matter of law, the franchise agreement they ultimately received in January, 2001, was not substantially equal, in form, to the franchise agreement form utilized at the time the Termination Agreement was executed in February, 2000. However, they have demonstrated an absence of fact that the defendant did not provide them the franchise agreement within a reasonable time.

The importance or materiality of contract terms must be assessed in context and in light of the expectations of the parties at the time the original contract was formed. *Phoenix*

*Power Partners, L.P. v. Colorado Public Utilities Commission*, 952 P.2d 359 (Colo. 1998). Plaintiffs negotiated for, and received, a franchise agreement as part of the Termination Agreement and further negotiated for, and received, the provision that the franchise agreement would be valid for 40 months from the effective date of the Termination Agreement. Accordingly, the plaintiffs would have a reasonable expectations that defendant would promptly provide them with a franchise agreement. By failing to provide the franchise agreement within a reasonable time, the defendant deprived the plaintiffs of a substantial benefit of their bargain and has, therefore, materially breached the Termination Agreement.

B. Plaintiffs' Damages

The objective in a breach of contract action is to place the injured party in this position it would have been in, if the breach had not occurred. *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 640 (Colo. Ct. App. 1999). The amount of damages awarded for a breach of contract cannot be based on speculation or conjecture; rather, it must be established with reasonable certainty by a preponderance of the evidence. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1381 (Colo. 1993). In their Amended Motion For Summary Judgment, plaintiffs argue that the breach by defendant "spoiled the richer fruits of the Termination Agreement, using a standard business model, and have justified [plaintiffs' actual and sustained damages." The standard business model is not described in the motion, nor any evidentiary materials regarding the standard business model attached. Two pages from the defendant's Unit UFOC Amended 07/2002 are attached as Exhibit 10 to plaintiffs' Amended Motion For Summary Judgment, to demonstrate plaintiffs' claim for lost profits. No other documentary

evidence is supplied with regard to the damages claims. In its response to the plaintiffs' Amended Motion For Summary Judgment, and in its own Motion For Summary Judgment, defendant argues that there is no genuine issue of material fact with regard to plaintiffs' claimed damages, because the plaintiffs have not demonstrated evidence of these damages. Plaintiffs indicate that they produced their federal income tax returns, but that evidence such as "receipts" in connection with the damages they claim are immaterial because the defendant did not seek them in discovery, and this lawsuit is not "an income tax audit."

First, plaintiffs claim $19,000 in damages for the taxes paid on the $57,859 they received pursuant to the Termination Agreement. The breach in this case is defendant's failure to provide a franchise agreement within a reasonable amount of time. Taxes paid on settlement sums received by the plaintiffs would not naturally flow as damages from such a breach. Accordingly, plaintiffs are not entitled to recover this amount as damages in this suit. See, generally, *Western Union Telegraph Co. v. Trinidad Bean & Elevator Co.*, 267 P. 1068, 1069 (Colo. 1928) (damages which arise naturally from a breach and as contemplated by the parties under a contract are recoverable for a breach of contract.).

Second, plaintiffs seek recovery of monies they spent in "developing plaintiffs' former Area and which plaintiffs had hoped to recover by becoming a franchisee." Defendant contends that these monies were spent under the contractual obligations of the ADMA, and are not recoverable in this action since the plaintiffs released the defendant from any such claims in the Termination Agreement. The Termination Agreement specifically provides, " ... nor shall the [defendant] or [plaintiffs] have any further obligation or duties, however characterized or described, with respect to

each other for obligations related to the Territory, except as set forth in this [Termination] Agreement." The Termination Fee negotiated and agreed to by the plaintiffs constituted payment in full of any amounts owned to the plaintiffs by the defendants in connection with their former Area or Territory, as it is referred to in the Termination Agreement. Plaintiffs have presented no evidence to the contrary. Any argument by the plaintiffs, that essentially, because the defendant caused a breach, they can also breach the Termination Agreement and seek payment of amounts in connection with their former Area or Territory, would be without merit. Under the cause of action brought by the plaintiffs, they can only seek to be placed in the position they would have been in, if the breach had not occurred. *Kaiser*, 992 P.2d at 636.

Third, plaintiffs claimed they lost income while dedicating their time and effort to their former Area and to scouting a location in anticipation of opening a franchise. As set forth above, damages in connection with plaintiffs' former Area or Territory are not recoverable in this action. Further, defendant cites to deposition testimony of the plaintiffs which indicate Mr. Wilson has been employed with the same employer since 1998, and Ms. Mollinger-Wilson has been employed with the same employer since 1998, and Ms. Mollinger-Wilson did not rebuild the consulting business she had in Washington D.C., upon moving to St. Louis, Missouri because her clients were east cost clients. Defendant's Motion for Summary Judgment, Docket #91, p. 15. Defendant alleges that plaintiffs have produced no evidence reflecting the amount of time or money they spent in this regard. Plaintiffs have countered the defendant's position, proffering a declaration regarding their income. However, the declaration falls short of what is required for plaintiffs to satisfy their burden in this regard, either in the context of the moving party under their Amended Motion For Summary Judgment

(i.e. the absence of a genuine issue of fact) or as the nonmoving party under the defendant's Motion For Summary Judgment (i.e. the existence of a genuine issue of fact).

As the moving party under a summary judgment motion, plaintiffs must demonstrate, by use of the pleadings, depositions, answers to interrogatories, admissions or affidavits, that there is no genuine issue of material fact and they are entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Further, when, as in this case, the nonmoving party under a summary judgment motion will bear the burden of proof at trial, the nonmoving party must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. U.S.* 622 F.2d 516, 519 (10th Cir. 1980); Fed.R.Civ.P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(e), except the pleadings themselves." *Celotex*, 477 U.S. at 324. In either case, the operative inquiry is whether, based on all documents submitted, a reasonable trier of fact could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. *See, generally, Anderson*, 477 U.S. at 250. Unsupported allegations without "any significant probative evidence tending to support the complaint" are insufficient, *see White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995), as are conclusory assertions that factual disputes exist. *Anderson*, 477 U.S. at 247-48.

Plaintiffs' Declaration indicates that Ms. Mollinger-Wilson "would forego other business opportunities in favor of [defendant]. Plaintiffs Response to Motion For Summary Judgment, Docket #114, Exh. 2, p. 2. However, nothing in the record demonstrates what those business opportunities were, or how much income was lost in that regard. The Declaration provides a summary of plaintiffs' combined total income for the years 1995 through 2000, which indicates a

decline in plaintiffs' income. *Id.* at p. 6. Aside from stating that their income was less, and providing a bare number representing their total income for a year, the plaintiffs provide no probative evidence to tie the decline in their income to the defendant's breach. Plaintiffs indicate that $19,192 was spent toward expenses carried-over from the area directorship and scouting locations in anticipation of becoming a franchisee. *Id.* at p. 4. Aside from plaintiffs' conclusory allegation, however, nothing in the record substantiates this claim or raises a genuine issue of fact to be decided at trial.

The fourth category of damages sought by the plaintiffs is lost profits. Plaintiffs calculated their damages in this record by using defendant's published average unit volume for restaurants, and by indicating that the defendant had placed the value of a franchise in the market sought by the plaintiffs to be in the top 10%. Defendant contends that the published statements relied upon by the plaintiffs concerned gross sales, not net profits. Defendant's position is substantiated by Exhibit #10 attached to plaintiffs' Amended Motion For Summary Judgment, containing a section entitled "Earnings Claims," and sets forth average gross sales figures for defendant's restaurants during the fiscal years 1997, 1998, 1999, 2000, and 2001. Pursuant to Colorado law, however, only net profits are recoverable. *See Fitzgerald v. Mountain States Tel. And Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995) (*citing Lee v. Durango Music*, 355 P.2d 1083, 1088 (Colo. 1960)). Defendant's literature indicates that earnings claims information should be obtained from franchise owners. Plaintiffs' Response to Motion For Summary Judgment, Docket #114, Exh. 11, p.2. Plaintiffs have provided no such information.

Additionally, "[l]ost profit awards in Colorado are not permitted if either the amount of the profits that would have been earned or the fact that the plaintiff would have earned them is too speculative to determine." *Republic Nat'l Life Ins. Co. v. Red Lion Homes, Inc.*, 704 F.2d 484, 489 (10th Cir. 1983). Profits for a new business, or one that is contemplated but not established, are not generally awarded in damages because they are too remote and speculative. *King v. United States,* 292 F.Supp. 767, 776 (D.Colo. 1968). At a minimum, plaintiffs must provide (1) proof of the fact that damages will accrue in the future, and (2) sufficient admissible evidence from which the damages can be computed. *Pomeranz*, 843 P.2d at 1382. In this case, under the Termination Agreement, plaintiffs could either have used the franchise agreement themselves to open a restaurant or sell the franchise agreement. The record contains evidence equally probative of either scenario. Since the fact of the damage is not established with the requisite degree of certainty under the record herein, calculation and award of any amounts for the damage is improper, *See*, generally, *Terrones v. Tapia*, 967 P.2d 216, 218-19 (Colo. Ct. App. 1998).

Finally, plaintiffs claim lost investment as a franchisee, estimating the value of a unit to be $250,000 to $350,000. Plaintiffs fail to set forth the basis of this claim, and record contains no apparent evidentiary basis for such damages. Material published by the defendant indicates it considers there will be an initial out-of-pocket investment of $210,000 to $242,000 in connection with a franchise. Plaintiffs' Response to Motion For Summary Judgment, Docket #114, Exh. 11, p. 2. Nothing in the record equates this investment expense to an investment value for plaintiffs' damage claim. When asked what he had in mind as the value of what he was getting in terms of the franchise agreement, Mr. Wilson

testified that the value was speculative. Defendant's Motion For Summary Judgment, Docket #91, Exh. A-4, p. 87.

Based upon the record herein, plaintiffs have failed to demonstrate they are entitled to summary judgment with regard to their claims for damages, and have failed to demonstrate that the evidence presents a sufficient disagreement to require submission for trial. In a breach of contract case, however, if the amount of loss is not satisfactorily proven, nominal damages can still be awarded. *Interbank Investments, LLC*, 12 P.3d at 1231. The fact finder has the authority to fix the amount of these damages. *Id.* Defendant's breach was in failing to provide the franchise agreement within a reasonable time, however, this breach was cured in January, 2001, when plaintiff's were provided with a franchise agreement. Plaintiffs have failed to establish that the franchise agreement they received was not substantially equal in form to the form utilized by the defendant at the time the Termination Agreement was executed, and the mere fact that the franchise agreement may not have been satisfactory to the plaintiffs is not relevant to the defendant's breach. As set forth above, the record does not establish a basis for damages due the plaintiffs if they had chosen to utilize the franchise agreement themselves. However, the record demonstrates that the plaintiffs were willing to transfer the franchise agreement for the sum of $15,000. Defendant's Motion For Summary Judgment, Docket #91, Exh. A-5, p. 1. Further, no prospective franchise would have paid plaintiffs more than $20,000 for their franchise agreement. *Id.* at A-2, p. 72. However, there is no evidence of a lost transfer or sale within the record. Plaintiffs' Amended Motion For Summary Judgment, Docket #54, Exh. 6, p. 2. Accordingly, the damage caused to the plaintiffs by receiving the franchise agreement approximately 11 months late would reasonably be interest that could have been earned on the amount of sale or

transfer amount. Such amount an (sic) amount is an appropriate award of nominal damages in this case.

## CONCLUSION

Based on the foregoing, I RECOMMEND the following:

A. The plaintiffs' Amended Motion For Summary Judgment [Filed November 1, 2002; Docket #54] be GRANTED with regard to the finding of a failure to perform by the defendant, but DENIED with regard to their claims of damages, with judgment for nominal damages being awarded.

B. The defendant's Motion For Summary Judgment [Filed February 18, 2003; Docket #90] be GRANTED, with the plaintiffs being awarded nominal damages.

Dated this 1st day of October, 2003.

BY THE COURT: O. EDWARD SCHLATTER
United States Magistrate Judge

## APPENDIX G

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed March 26, 2003]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT**

Order Entered By Magistrate Judge: O. Edward Schlatter

Plaintiffs have filed a motion entitled "Leave to Amend Complaint." In their motion, plaintiffs seek leave to add a claim of fraudulent misrepresentation. Defendants object to the motion and have filed a pleading in opposition. I will deny plaintiffs' motion for leave to add a claim of fraudulent misrepresentation.

I can add nothing to defendant's very thorough, well-reasoned and accurate discussion of the legal principles that apply to plaintiffs' motion. I will merely summarize here my reasons for denying plaintiffs' motion.

1. Discovery is closed, a preliminary pretrial order has been prepared, and both sides of the lawsuit have filed motion for summary judgment.

2. Plaintiffs state that their claim of fraudulent misrepresentation merely "conforms to the material facts already on record without additional discovery." Pltfs' Mtn at ¶ 5. However, beyond this conclusory statement, plaintiffs do not state what that evidence is. On the other hand, defendant assets that addition of this claim either will cause prejudice defendant, will cause defendant to draft a new summary judgment or will cause defendant to seek to reopen discovery for the purposes of defending against the new claim. Because the elements of fraudulent misrepresentation are different from the elements of breach of contract (see paragraph 4 below), the need to re-open discovery if the amendment is granted is manifest.

3. Plaintiffs do not state why, through the exercise of due diligence, they could not have sought to file this claim either before the deadline for doing so passes, or, at least, before the close of discovery. They state that the evidence to support their claim has been received from the defendant itself, but they do not state what that evidence is or when it was received. Without evidence that plaintiffs could not, even with the exercise of due diligence, have obtained the evidence supporting their new claim prior to the date that they allegedly obtained it, plaintiffs' effort to amend clearly is untimely.

4. Plaintiffs may even misunderstand the elements of fraudulent misrepresentation. They state that "defendant's declaration and plaintiffs' depositions, cumulatively, point to a level of contractual breach that rises to fraudulent misrepresentation in that ... statements of *true* material fact were intentionally made to plaintiffs...." *Id.*, emphasis added. The elements of fraudulent misrepresentation are: (1) a *fraudulent or false* misrepresentation of material fact; (2) the plaintiffs' reliance on the material representation; (3) the plaintiffs' right or justification in replying on the misrepresentation and (4) reliance resulting in damages. *See Nielson v. Scott*, 53 P.3d 777, 779-80 (Colo. App. 2002).

5. The standard for amending a complaint pursuant to Rule 16 is different that the standard which is contained in Rule 15(a):

> Where, as here, a motion to amend the pleadings ... is filed after the scheduling order deadline, a "two-step analysis" is required. Once a scheduling order's deadline for amendment has passed, a movant must first demonstrate to the court that it has a "good cause" for seeking modification of the scheduling deadline under Rule 16(b). If the movant satisfied Rule 16b's "good cause" standard, it must then pass the requirements for amendment under Rule 15(a)....
>
> Rule 16(b)'s "good cause standard is much different than the more lenient standard contained in Rule 15(a). Rule 16(b) does not focus on the bad faith of the movant, or the prejudice of the opposing party. Rather it focuses on the diligence of the party seeking leave to modify the scheduling order to permit the proposed amendment. Properly construed, "good cause" means that scheduling deadlines cannot be met

> despite a party's diligent efforts. In other words, this court may "modify the schedule on a showing of good cause if [the deadline] cannot be met despite the diligence of the party seeking the extension." Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.

*Dilmar Oil Co., Inc. v. Federated Mutual Ins. Co*, 986 F. Supp. 959, 980 (D.S.C. 1997), *aff'd*, 129 F.3d 116 (4th Cir. 1997); *accord*, *Denmon v. Runyon*, 151 F.R.D. 404, 407 (D. Kan. 1993).

6. Plaintiffs have failed to present good cause for failing to meet the scheduling deadlines.

Conclusion

Therefore, for the reasons stated above and in defendant's Opposition, "Plaintiff's Leave to Amend Complaint" [filed February 12, 2003] is DENIED.

Dated at Denver, Colorado this day of: March 25, 2003

BY THE COURT: O. EDWARD SCHLATTER
U.S. Magistrate Judge

## APPENDIX H

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed March 5, 2003]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**ORDER DENYING PLAINTIFFS' MOTION TO COMPEL AND ORDER GRANTING PLAINTIFFS' MOTION FOR EXTENSION**

Order Entered By Magistrate Judge O. Edward Schlatter

Plaintiffs have filed two motions, and the relief sought in each motion is overlapping with the other. Plaintiffs' Motion to Compel asks for several forms of relief: (a) that I allow plaintiffs to take deposition of one of the corporate officers for Quizno's; (b) that I direct "defendant [to] answer in full their request for admissions and disclose all documents normally related subsequent to the award of a franchise

agreement;" and (c) as a sanction against defendant, that I direct any depositions be conducted in a place convenient to plaintiffs.

Plaintiffs' motion for extension of time asks that I extend the time within which plaintiffs' response to defendant's motion for summary judgment is due. Plaintiff's request that they be provided with a date that would be after they receive the discovery that the (sic) are seeking in their Motion to Compel.

I will deny plaintiff's Motion to Compel. However, I will extend the time within which their response to the motion for summary judgment is due.

Motion to Compel. I will deny plaintiffs' Motion to Compel for several reasons. First, plaintiff's request to conduct depositions at this time is untimely. The deadline for discovery has passed. Plaintiffs admit in their motion that they passed upon several opportunities to depose corporate figures. To the extent that they are arguing that the late deposition that they are requesting is made necessary by the tardy production of materials from Quizno's, plaintiffs have not provided any details that would permit me to conclude either that the disclosures were untimely, or that the disclosures were of such relevance, materiality and importance that good cause for late depositions has been presented.

Second, I cannot provide any relief to plaintiffs with regard to their request for defendant to answer in full certain discovery because plaintiffs have failed to comply with our local rules in regard to the presentation of such a request. Local Rule 37.1 states that "[a] motion under Fed.R.Civ.P. 26 or 37 directed to interrogatories or requests under Fed.R.Civ.P. 33 or 34 or to responses thereto *shall set forth*

*verbatim the interrogatory, request, and response to which the motion is directed.*" D.C.COLO.LCivR 37.1, emphasis added. If plaintiffs are claiming that Quizno's has failed to respond adequately to a discovery request, plaintiffs are obligated to present the full text of the query, and the full text of the response, together with any argument that they might make.

Because I am denying plaintiff's request for depositions, their third request, that depositions be conducted in a place convenient to them, is moot.

Motion for extension of time. Even though I am denying the requests that are contained in plaintiffs' Motion to Compel, I will extend their deadline for filing a response to the motion for summary judgment. The present deadline is March 20, 2003, which I will extend to April 1, 2003.

It is therefore Ordered as follows:

1. Plaintiff's Motion to Compel [filed February 24, 2003] is DENIED.

2. Plaintiff's Leave for Extension of Time to Respond to Defendant's Motion for Summary Judgment [filed March 3, 2003] is GRANTED to and including April 1, 2003.

Dated at Denver, Colorado, this day of: March 5, 2003.

BY THE COURT: O. EDWARD SCHLATTER
United States Magistrate Judge

## APPENDIX I

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed September 19, 2002]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**ORDER REJECTING MAGISTRATE JUDGE'S RECOMMENDATION**

This matter is before the Court on the "Recommendation [of United States Magistrate Judge] for Dismissal" filed May 24, 2002. The magistrate judge has recommended that I granted defendant's motion for judgment on the pleadings on the ground that the action is time-barred. He also recommended, however, that I deny defendant's request for its costs and attorney fees. Each party has objected to the recommendation.

A district court assessing a magistrate judge's findings of fact and recommendations for disposition of a motion such as this – a motion for judgment on the pleadings – must make a "de novo determination of those portions of the [recommendation] ... to which objection is made." See 28 U.S.C.A. § 636(b)(1)(West 2000); Fed. R. Civ. P. 72(b). "When conducting de novo review, the district court makes its own determinations of disputed issues and does not decide whether the magistrate's proposed findings are clearly erroneous." I have conducted the requisite *de novo* review of the issues, the record, and the recommendation. Based on this review, I have reached the conclusions set forth herein.

*Plaintiffs' Objections*

Before the magistrate judge, plaintiffs [1] argued that their

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[1] The parties are engages in another contretemps concerning whether Plaintiff Elizabeth Mollinger-Wilson (who is not a lawyer) has properly filed papers on behalf of Plaintiff Robert Wilson. The only paper which appears to omit a signature of Robert Wilson is one styled "Plaintiffs' Objections to U.S. Magistrate Judge's Recommendation for Dismissal & Request for Reconsideration Per Fed. R. Civ. P. 72" (filed June 3, 2002). Although the title of the paper is confusing, the text demonstrates that the relief sought was this court's review of the magistrate judge's recommendation, not further action by the magistrate judge. The magistrate judge nonetheless denied the motion for reconsideration. This filing, I note, was three days before defendants filed their own objections (sic) the recommendation on June 10, 2002. The magistrate judge's recommendation having been mailed on May 24, 2002, and holidays and weekends having been properly excluded under Fed. R. Civ. P. 6, *see Lerro v. Quaker Oats Co.*, 84 F.3d 239 (7th Cir. 1996), both sets of objections were timely filed. On this state of the record, the court will simply remind plaintiffs of what they apparently now know: neither plaintiff can act as the other's

claims were timely filed because the applicable limitations period is the one found in section 19.3 of the so-called "Illinois Rider" to the parties June 30, 1998, Area Director Marketing Agreement (ADMA). The magistrate judge did not decide whether the Illinois Rider applied because he concluded that plaintiff's had only one year to bring the action under *either* the ADMA or the Illinois Rider. Consistent with this conclusion, defendant maintains, "The Illinois Rider simply adopted the three-year repose and one year discovery provisions of the Illinois Franchise Disclosure Act. Thus, even if the claims asserted in plaintiffs' complaint are subject to the Rider's provisions, they are untimely since plaintiffs clearly knew of show have know [sic] of them more than a year prior to the date their complaint was filed...." Quizno's Franchise Co's Repl. Mem. in Further Support of Mot. for J. on Pleadings (filed May 20, 2002). In their objections to the magistrate judge's recommendation, plaintiffs vigorously contend (1) that the Illinois Rider wholly deleted section 19.3 of the ADMA and substituted a new section 19.3 and (2) that the substituted section affords them three years within which to bring their claims.

Contrary to defendant's initial response to plaintiff's objections, I conclude that the substance of the objections was fairly presented to the magistrate judge and is properly before this court for review. In their reply to defendant's motion for judgment on the pleadings, plaintiffs argued that the Illinois Rider "*does alter*" section 19.3 of the ADMA "and substitutes the one-year to "three years after the act or transaction constituting the violation upon which it is based [sic]." (Underlining in original.) Notwithstanding defendant's

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lawyer, ever with a power of attorney from the other. Each plaintiff must sign every paper which they file.

contention, this argument is identical to the one repeated by plaintiffs in their objections made to this court.

Turning to the substance of the magistrate judge's ruling, I cannot agree with his or defendant's interpretation of section 19.3. Contrary to defendant's initial contention, the so-called "Illinois Rider" to the ADMA , attached to the ADMA and signed by all parties to the ADMA, plainly and unambiguously states that "Section 19.3 [of the ADMA] is hereby deleted in its entirety and the following is substituted in its place." There is simply no basis in this language for any contention that the one-year limitations period in section 19.3 of the ADMA somehow survives and governs this controversy.

Substituted section 19.3, as it appears in the Illinois Rider to the ADMA, says:

> Any claims between the parties must be commenced within three years after the act or transaction constituting the violation on which it is based, within one year after the A[rea] D[irector] becomes aware of facts or circumstances reasonably indicating that he may have a claim for relief in respect to conduct covered by the *Illinois Franchise Disclosure Act*, or 90 days after the delivery to the AD of a written notice disclosing the violation, whichever shall first expire.

(Emphasis supplied). The magistrate judge's recommendation apparently overlooks the limiting phrase "in respect to conduct covered by the Illinois Franchise Disclosure Act." Stated otherwise, the magistrate judge concluded that the shorter of (1) a three-year period of repose or (2) a one-year discovery period applied to plaintiffs' claims and that

plaintiffs (who plainly knew of their claims no later than January 5, 2001) had missed the one-year discovery period. As a matter of grammar and sentence structure, however, the one-year discovery period (the middle of the three distinct time periods addressed in section 19.3) appears to apply only to "conduct covered by the Illinois Franchise Disclosure Act." Were this phrase ("in respect to conduct covered by the Illinois Franchise Disclosure Act") intended to modify the "three year" clause or the "90-day" clause, as well as the "one-year" clause, it would have been placed elsewhere – at the beginning or end – of the three parallel clauses, so as to make clear that the phrase refers to all three possible time periods. As I interpret section 19.3, in other words, the one year discovery period applies only to "a claim for relief in respect to conduct covered by the Illinois Franchise Disclosure Act." As to other claims, not covered by the Act, a claimant must commence a lawsuit "within three years after the act or transaction constituting the violation on which it is based" or "within 90 days after the delivery to the AD of a written notice disclosing the violation." [2] Sincere there is no contention that the Act applies to plaintiffs' claims [3], the three-year repose period applies and the claims are timely.

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[2] The 90-day period is not at issue here, since nobody contends that it controls.

[3] The claims asserted in plaintiffs' complaint for breach of their Termination Agreement are not claims arising under the IFDA [Illinois Franchise Disclosure Act] or based on conduct governed by the IFDA. Quizno's Franchise Co's Mem. of Law in Supp. of Mot. For J. on Pleadings at 5 (filed May 7, 2002).

*Defendant's Objections*

Defendant's objections are premised on the erroneous supposition that defendant is the prevailing party at this juncture. Accordingly, it is ORDERED as follows:

1. The recommendation (#21) is REJECTED.

2. The motion for judgment on the pleadings (#12) is DENIED.

3. Plaintiffs' objections to the magistrate judge's order denying their motion for reconsideration (##29, 31) are DENIED as moot.

4. The case is hereby RECOMMITTED the assigned magistrate judge for further pretrial proceedings consistent with this order and the previously-entered order of reference.

Dated this 19 day of September, 2002.

BY THE COURT:

/s/_____
EDWARD W. NOTTINGHAM
United States District Judge

## APPENDIX J

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**No. 02-N-0436 (OES)**

**[Filed May 24, 2002]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

**RECOMMENDATION FOR DISMISSAL**

Entered by O. Edward Schlater, United States Magistrate Judge

**INTRODUCTION**

In their Complaint, filed on March 4, 2002, plaintiffs allege that defendant has breached a Termination and Release Agreement ("Termination Agreement") reached between the parties in a previous lawsuit. The prior litigation concerned defendant's termination of an Area Director Marketing Agreement ("ADMA") for alleged material breaches by the plaintiffs. A settlement was reached in that suit, and the

Termination Agreement sets forth the terms of its resolution, providing, among other things, that:

> As consideration for [plaintiffs] relinquishing [their] rights under the ADMA, [defendant] shall pay [plaintiffs] the amount of $57,859, payable within three (3) business days from the date the Agreement is fully executed by the Parties, plus one (1) franchise agreement, substantially equal to [defendant's] present form franchise agreement and valid for 40 months from the effective date of the Agreement, which the [plaintiffs] may use in the Territory or which the [plaintiffs] may sell to a third party, subject to [defendant's] approval of the third-party as a qualified [defendant's] franchisee ("Termination Fee"). The Parties hereby agree that payment of the Termination Fee constitutes payment in full of any amounts owed to [plaintiffs] by [defendant] in connection with the Territory.

*Mollinger-Wilson, et al. v. Quizno's*, Civil Action No. 02-N-0436, Docket #1, Complaint (Attached Termination Agreement, p. 1). The Termination Agreement is dated February 28, 2000. *Id.*

Plaintiffs allege that defendant has breached this agreement because (1) defendant failed to send plaintiffs a franchise agreement until January 5, 2001, (2) the franchise agreement that was received was not "substantially equal to" the present form franchise agreement, and (3) defendant now implies that a transfer fee would be payable in the event the franchise agreement was sold to a third-party.

Defendant seeks judgment on the pleadings, pursuant to Rule 12(c) Fed.R.Civ.P., based on provisions of the ADMA it claims survived under the Termination Agreement providing for a claims limitations period of one year from the occurrence of the facts giving rise to any such claim. Additionally, defendant seeks its costs and expenses, including attorneys' fees. Plaintiffs have responded to the motion, contending that their claims are not time-barred because (1) the six-year contractual limitations for common law breach of agreement/contract apply, (2) under an applicable rider to the ADMA, the plaintiffs have three years to bring this action and/or (3) based on a continuing breach of agreement and contract by the defendants, the action is timely. Defendant has filed a reply, contending that the plaintiffs' responses are without merit.

## DISCUSSION

A motion for judgment on the pleadings pursuant to Rule 12(c) Fed.R.Civ.P. is viewed under the same standards as a motion to dismiss under Rule 12(b)(6) Fed.R.Civ.P. for failure to state a claim upon which relief can be granted. *See Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528 (10th Cir. 1992). A district court should dismiss a case, or any part thereof, only when it appears that the plaintiff can prove no set of facts in support of the claims which would entitle the plaintiff to relief, *see Maher v. Durango Metals., Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *See Neitzke v. Williams*, 109 S. Ct. 1827 (1989). The court must accept as true all well-pled factual allegations in the complaint, but not conclusory allegations, *See Maher*, 144-F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *See Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir. 1998). The issue is

not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *See Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974) (overruled on other grounds).

Generally, when viewing a Rule 12(c) motion, the court may not consider evidence outside the pleadings. *See Prager v. LaFaver*, 180 F.3d 1185, 1188-89 (10th Cir. 1999). However, documents referred to in a company and central to its claims are not considered to be outside the pleadings. *Id.* The court is not required to consider them, but may do so in its discretion. *Id.*

Paragraph #3 of the Termination Agreement, sets forth the parties' agreement on what provisions of the ADMA survive its termination and provides:

> Except as expressly superseded by this Agreement, all provisions of the ADMA that expressly or by their nature survive the expiration or termination of the ADMA shall continue in full force and effect subsequent to and notwithstanding the termination of the ADMA hereunder until such provisions are satisfied or by their nature expire, including without limitation provisions related to confidential information, post-termination covenants not to compete, notice provisions and provisions related to governing, venue, and dispute resolution, which provisions of the ADMA are incorporate herein by reference.

In Section 19, entitled "Disputes," at page 16 of the ADMA, the parties agreed that any disputes shall be governed by the laws of the State of Colorado, except to the extent governed by federal law, and further provides:

> Any claims between the parties must be commenced within one year from the occurrence of the facts giving rise to such claim, or such claim shall be barred. The parties understand that such time limit may be shorter than otherwise allowed by law.

Mollinger-Wilson, Civil Action No. 02-N-0436, Docket #12, The Quizno's Franchise Company's Memorandum of Law in Support of Motion for Judgment on the Pleadings (Exhibit 1).

There further exists an Illinois Rider ("Rider") attached to the ADMA, also signed by the parties, which sets forth law and venue provisions which retain the choice of Colorado law under the ADMA, except for claims arising under the Illinois Franchise Disclosure Act ("IFDA"), and directs a three-year repose period and one year limitations period for such claims as follows:

> Any claims between the parties must be commenced within three years after the act or transaction constituting the violation upon which it is based, within one year after the [plaintiffs become] aware of facts or circumstances reasonably indicating that [they] may have a claim for relief in respect to conduct governed by the [IFDA], or 90 days after delivery to the [plaintiffs] of a written notice disclosing the violation, whichever shall first expire, or such claim shall be barred. *Id.*

It is recognized that '[p]arties to a contract may require that actions founded on the contract be commenced within a shorter period of time than that prescribed by the applicable statute of limitations," and "such a contractual limitation is enforceable, provided that the period ... is reasonable and

that provision has not been waived." *Hepp v. United Airlines, Inc.*, 540 P.2d 1141, 1143 (Colo. Ct. App. 1975). In this case, the Termination Agreement sets forth that provisions of the ADMA regarding choice of law and dispute resolution survive the termination of the ADMA and are applicable to the Termination Agreement by their incorporation into that document. Plaintiffs' complaint seeks recovery based on a duty arising only out of the Termination Agreement, and is not a right that arises from any common law or other source which may give rise to the application of a different limitations period. Accordingly, with regard to plaintiffs' claims for breach of the agreement, the limitations period contained within the Termination Agreement is controlling.

Plaintiffs have argued that under the Rider to the ADMA, they have three years to bring this action. Defendant counters that the plaintiffs' claims do not rise under the IFDA and are not based on conduct governed by the IFDA, therefore the limitations period of the Rider is not applicable. It is not necessary for the court to determine this issue. The undisputed fact in this situation is that plaintiffs received a franchise agreement, pursuant to the Termination Agreement, on January 5, 2001, and they found it "not substantially equal to" the present form franchise agreement. [1] As noted above,

---

[1] Defendant has alleged that the limitations period should begin to run from March 2, 2000, based on the "three (3) business days" language of Paragraph #2 of the Termination Agreement (set forth previously in this Recommendation) executed on February 28, 2000. However, viewing all reasonable inferences from this language in favor of the plaintiffs, the court finds that based upon the grammatical structure of the sentence and the use of the word "payable," the "three (3) business days" language to pertains to the payment of the $57,859 due under the agreement and does not set forth a time period for providing a franchise agreement.

the limitations of claims section of the Rider provides three limitations scenarios, with the applicable limitation period based upon which scenario expires first; the second scenario providing a one-year limitation following the discovery of facts or circumstances reasonably indicating a claim. The ADMA provides a one-year period of limitations from the occurrence of the facts giving rise to such claim. Accordingly, under either the limitations period of the ADMA or the Rider, the plaintiffs had one-year from January 5, 2001 to bring this action. Plaintiffs did not file their complaint until March 4, 2002.

Because plaintiffs brought this lawsuit after the limitations period expired, their claims will be barred, unless a factual basis for tolling the limitations period exists. *See Aldrich v. McCulloch Properties, Inc.* 627 F.2d 1036, 1041 N. 4 (10th Cir. 1980). Neither the plaintiffs' complaint, nor their response to the defendant's motion, have provided facts from which the court can make a finding under which the limitations period would be tolled. Plaintiffs do argue that the defendant "to this day" has provided no proper franchise agreement under the Termination Agreement, thereby constituting a continuing "willful and deliberate" breach of the Termination Agreement. Plaintiffs also content that the defendant's timing in sending them the franchise agreement on January 5, 2001, did not allow them enough time to take care of activities necessary to bring suit within the limitations period. However, even liberally construing these arguments as a contention that equitable estoppel should apply to toll the limitations period does not provide a means by which the court can toll the limitations period.

The following elements must be established to support a claim of equitable estoppel: (1) the party to be estopped must know the facts and either intend the conduct to be acted on or

act in such a way that the party asserting estoppel has a right to believe the other party's conduct is so intended; (2) the party asserting estoppel must be ignorant of the facts' and (3) the party asserting estoppel must reasonably rely on the other party's conduct to its detriment. Committee for Better Health Care v. Meyer, 830 P.2d 884, 891-92 (Colo. 1992); Fanning v. Denver Urban Renewal Authority, 709 P.2d 22, 23 (Colo. Ct. App. 1985). Here, documents executed by the plaintiffs during the course of these matters expressly set forth the parameters of the limitations period for claims. The plaintiffs received the franchise agreement on January 5, 2001, and determined that it was not "substantially equal to" the present form franchise agreement. Accordingly, as the party asserting estoppel, plaintiffs cannot be found to be ignorant of the facts and the elements of equitable estoppel cannot be established.

Finally, with regard to defendant's request for its costs and expenses, in the absence of statutory or contractual authorization, attorney fees and costs are not recoverable in an action for breach of contract. *See Bunnett v. Smallwood*, 793 P.2d 157, 10 (Colo. 1990). The Termination Agreement provides:

> [I]n the event of any litigation between the Parties based upon an alleged breach of default of their respective obligations to be fulfilled pursuant to this Agreement, the prevailing Party therein shall be entitled to recover attorney's fees and court costs against the non-prevailing Party in accordance with the dispute resolution provisions of the ADMA.

Section 19 of the ADMA, entitled "Disputes," contains no provision regarding recovery of fees and costs. In Section 20, entitled "Miscellaneous Provisions," at Subsection 20.3, entitled "Attorneys' Fees," the ADMA sets forth:

> In the event of any *default* on the part of either party to this Agreement, in addition to all other remedies, the party in default will pay the aggrieved party all amounts due and all damages, costs and expenses, including reasonable attorney's fees, incurred by the aggrieved party in any legal action or other proceedings as a result of such default, plus interest at the lesser of 2% per month or the highest rate allowable by law, accruing from the date of such default. (Emphasis added.)

The ADMA, however, makes no provision for recovery of costs and expenses in litigation based on an alleged breach. Plaintiffs have represented to the court, and defendants have not denied, that the defendant was the drafter of the Termination Agreement. Therefore, the ambiguity which exists between the language of the Termination Agreement and the ADMA shall be against the defendant, as the drafter of these documents. *See, e.g., Green Shoe Mfg. Co. v. Farber,* 712 P.2d 1014, 101 (Colo. 1986). Accordingly, the court finds that attorney fees and costs are recoverable under the Termination Agreement for litigation concerning default, but not for litigation concerning breach of contract. Since this suit concerns claims of breach, not default, and the defendant has cited the court to no other authority for its position, their request should be denied.

## CONCLUSION

Based on the foregoing, I RECOMMEND that District Judge Edward W. Nottingham GRANT defendant's Motion for Judgment on the Pleadings [Filed May 7, 2002; Docket #12], and enter an Order directing this case be dismissed with prejudice. I further RECOMMEND that Judge Nottingham DENY defendant's request for costs and expenses, to include attorneys' fees, as set forth within the Motion for Judgment on the Pleading [Filed May 7, 2002; Docket #12].

Plaintiffs are entitled to see review or reconsideration of my recommendation by filing "objections" to my recommendation within ten days. An advisement of his right to appeal or object is attached to this Recommendation on a page which is entitled "Advisement Under Fed.R.Civ.P. 72."

Dated at Denver, Colorado, this 24th day of May, 2002.

O.EDWARD SCHLATTER
United States Magistrate Judge

## APPENDIX K

**STATE OF WISCONSIN**
**DEPARTMENT OF FINANCIAL INSTITUTIONS**
**DIVISION OF SECURITIES**
**CERTIFICATE**

I, David A. Cohen, hereby certify that I am the Supervising Attorney in the Bureau of Registration & Enforcement of the Division of Securities in the Department of Financial Institutions for the State of Wisconsin, and that in such capacity I have custody and control of the files and records of the Division of Securities in the administration of CH.551, Wis. Stats., the Wisconsin Uniform Securities Law.

I further certify that I have reviewed the following documents on file with our office and find no mention of either Robert F. (sic) Wilson or Elizabeth Mollinger-Wilson in either the list of Wisconsin franchises in operation or unopened franchises:

December 2000 – Area Director Franchise The Quizno's Franchise Company
December 2001 – Standard Franchise – The Quizno's Franchise Company
July 2002 – Standard Franchise – Quizno's Franchising LLC

IN WITNESS WHEREOF I have hereunto set my hand and seal at Madison, Wisconsin, this 13th day of August, 2002.

(SEAL) DAVID A. COHEN
**Supervising Attorney**
**Bureau of Registration & Enforcement**

## APPENDIX L

THIS AGREEMENT (the "Agreement") is made effective this 28th day of February, 2000 among THE QUIZNO'S CORPORATION, a Colorado corporation ("Franchisor") and COL. ROBERT E. WILSON, USMC Ret. and ELIZABETH MOLLINGER-WILSON ("AD") (collectively referred to as "Parties").

### RECITALS

1. The Parties entered into an area director marketing agreement dated June 30, 1998 (the "ADMA"), whereby the AD was granted the right to sell and develop Quizno's Classic Subs franchises in the following area: Green Bay-Appleton, Wisconsin (the "Territory"). The Parties hereby desire to terminate the ADMA.

2. On or about January 26, 2000, Franchisor filed a Complaint in the United States District Court for the District of Colorado, *The Quizno's Corporation v. Robert E. Wilson and Elizabeth Mollinger-Wilson*, Case No. 00-N-163, seeking a declaratory judgment that the ADMA may be properly termination (the "Litigation"). The Parties desire to dismiss the Litigation and to release each other from any and all claims arising out of the ADMA and their business relationship created thereunder, except as specifically set forth herein.

3. A capitalized terms not defined herein shall have the same meaning as set forth in the ADMA.

NOW THEREFORE, the Parties agree as follows:

1. *Termination*. The ADMA, is terminated effective as of the date hereof and shall be of no further force or effect, nor shall the Franchisor or AD have any further obligations or duties, however characterized or described, with respect to each other for obligations related to the Territory, except as set forth in this Agreement. Concurrently with the execution of this Agreement, except as is set forth below, the AD shall immediately cease using any or all of the Franchisor's proprietary marks, color combinations, design, symbols, slogans and trade secrets in the Territory. The AD acknowledges and agrees that the unauthorized use of the Franchisor's proprietary marks will constitute irreparable damages for which the Franchisor may obtain injunctive relief in addition to the claiming of monetary damages.

2. *Termination Fee*. As consideration for AD relinquishing its rights under the ADMA, Franchisor shall pay AD the amount of $57,859, payable within three (3) business days from the date the Agreement is fully executed by the Parties, plus one (1) franchise agreement, substantially equal to Franchisor's present form franchise agreement and valid for 40 months from the effective date of the Agreement, which the AD may use in the Territory or which the AD may sell to a third-party, subject to Quizno's approval of the third-party as a qualified Quizno's franchisee ("Termination Fee"). The Parties hereby agree that payment of the Termination Fee constitutes payment in full of any amounts owed to AD by Franchisor in connection with the Territory.

3. *Survival of Certain Provisions*. Except as expressly superseded by this Agreement, all provisions of the ADMA that expressly or by their nature survive the expiration or

termination of the ADMA hereunder until such provisions are satisfied or by their nature expire, including without limitation provisions related to confidential information, post-termination covenants not to compete, notice provisions and provisions related to governing law, venue, and dispute resolution, which provisions of the ADMA are incorporated herein by reference.

4. *Confidentiality*. The Parties agree that the terms and circumstances relating to the Parties' relationship, their entry into the ADMA, the ADMA's subsequent termination, and the terms and conditions of the Agreement (collectively, the "Parties' Relationship") shall remain confidential and shall not be disclosed to third parties, except by the extent required by court order or to comply with any applicable law or regulation.

5. *Indemnification*. If the AD is served with a subpoena or otherwise subjected to legal process by a law firm(s) to which the AD has previously spoken regarding the Parties' Relationship, Quizno's shall defend and indemnify the AD for their legal expenses (including the AD's personal costs up to $1000.00) relating to such subpoena or process.

6. ***Release***.

(a) The AD, for itself and its Bound Parties, and their respective heirs, successors, assigns, agents and representatives, hereby fully and forever unconditionally release and discharge Franchisor, and its successors, assigns, agents, representatives, officers, employees, and directors (collectively referred to as "Franchisor Affiliates") from any and all claims, demands, obligations, actions, liabilities, and damages of every kind and nature whatsoever, in law or in equity, whether known or unknown to it, which may hereafter

be discovered, in connection with, as a result of, or in any way arising from, any relationship or transaction with the Franchisor or the Franchisor Affiliates arising from the ADMA or otherwise, however characterized or described, from the beginning of time until the date of this Agreement, except and unless such claim, demand, obligation, action, liability, or damage arises from a breach or default in the Franchisor's obligations to be fulfilled pursuant to this Agreement.

(b) The Franchisor, for itself, its successors, assigns, agents, representatives, officers, employees and directors, hereby fully and forever unconditionally releases and discharges the AD, its Bound Parties, and their respective heirs, successors, assigns, agents, and representatives from any and all claims, demands, obligations, actions, liabilities, and damages of every kind and nature whatsoever, in law or in equity, whether known or unknown to it, which it may now have against the AD, or which may hereafter be discovered, arising from the ADMA or otherwise, however characterized or described from the beginning of time until the date of this Agreement, except and unless such claim, demand, obligation, action, liability, or damage arises from a breach of default in the AD's obligations to be fulfilled pursuant to this Agreement.

7. *Dismissal with Prejudice.* Within seven (7) business days from the date the Agreement is fully executed by the Parties, the Franchisor will file a notice of dismiss of the Litigation with prejudice ("Notice") and mail a copy of the Notice to the AD. The Notice shall include words to the effect that (a) the Parties have settled amicably; (b) the filing of the Litigation by Quizno's was regrettable; and (c)

Quizno's did not intend through the filing of the Litigation to impugn the character or business practices of the AD.

8. *Binding Effect*. This Agreement shall be binding upon and enurc (sic) to the benefit of the successors, assigns, trustees, receivers, personal representatives, legatees, and devisees of the Parties.

9. *Attorneys' Fees*. Both Parties shall be responsible for paying its own costs and expenses incurred in the preparation of this Agreement. However, in the event of any litigation between the Parties based upon an alleged breach or default of their respective obligations to be fulfilled pursuant to this Agreement, the prevailing Party therein shall be entitled to recover attorney's fees and court costs against the non-prevailing Party in accordance with the dispute resolution provisions of the ADMA.

10. *Entirety*. This Agreement embodies the entire agreement and understanding between the Parties and supersedes all prior agreements and understandings related to the subject matter hereof (other than the provisions that survive termination of the ADMA as set forth herein).

11. *Severability*. The separate paragraphs of this Agreement are severable, and the finding or determination by any court of law that a certain section or paragraph of this Agreement is unenforceable shall not render the entire Agreement unenforceable.

12. *Miscellaneous*. The Parties agree that, in entering into this Agreement, they are relying upon their own judgement, belief, and knowledge as to all phases of any claims and further acknowledge that no promise, inducement or agreement or any representations and warranties not expressed

herein have been made to procure their agreement hereto. The Parties further, acknowledge that this Agreement is contractual and not merely recital, and that they have read, understand, and fully agree to the terms of this Agreement.

13. *Execution in Counterparts*. This Agreement may be executed in one or more counterparts, and each counterpart to be considered an original portion of this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be made effective on the day and year first above written.

THE QUIZNO'S CORPORATION
By: /s/ Patrick Meyers
Its: Vice President/General Counsel

Col. Robert E. Wilson, USMC, Ret.
Elizabeth Mollinger-Wilson

(2)

Supreme Court, U.S.
FILED
JUN 9 - 2005
OFFICE OF THE CLERK

No. 04-1306

# In the Supreme Court of the United States

ELIZABETH MOLLINGER-WILSON AND
LT. COLONEL ROBERT E. WILSON, USMC-RET.,
*Petitioners*,

v.

THE QUIZNO'S FRANCHISE COMPANY,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR REHEARING

ELIZABETH MOLLINGER-WILSON
ROBERT E. WILSON
12017 VIVACITE DRIVE
ST. LOUIS, MO 63146
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*Petitioners pro se*

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## INTRODUCTION

Grounds for this Petition For Rehearing are as follows: *First*, it is proper that the record be completed as there is a post-judgment order from the U.S. District Court for the District of Colorado, issued after petitioners filed their Petition For Writ Of Certiorari, that substantially favors the question presented by petitioners. *Second,* to raise substantial issues not previously presented regarding Federal Rule 56 and the practices of the Tenth Circuit as related to this, and other, pro se appeals. Respondent did not respond to the Petition For Writ of Certiorari. This petition is timely filed under Rule 44(2) of the Rules of the Supreme Court.

## REASONS FOR REHEARING

### I. THE U.S. DISTRICT COURT'S POST-JUDGMENT ORDER FAVORS THE QUESTION PRESENTED BY PETITIONERS.

As background, petitioners note that:

In March 2004, the U.S. District Court for the District of Colorado granted petitioners' motion for summary judgment ruling that respondent *"materially breached"* a contract that was executed in front of the same federal court. Although finding merit to petitioners' claim and although petitioners asked for a trial on damages, the District Court granted respondent's cross-summary judgment motion, awarding petitioners nominal damages.

Petitioners raised the question to this Supreme Court if the respondent, in their cross-motion, violated petitioners' Fourth Amendment Constitutional right to privacy to be secure in their personal papers. The added implication is that such a

violation allows the courts to issue an order to compel production of personal papers for one specific reason, then later "move the line" and allow those same papers to be used in another manner – impacting the aggrieved party's procedural due process right to appeal the court's initial order.

At issue is the manner in which respondent used copies of petitioners' income tax returns. Petitioners pointed to the record on appeal that is ***undisputedly*** clear that the U.S. Magistrate Judge compelled petitioners to produce copies of their income tax returns, reasoning that respondent was "*entitled to have your income tax returns so that they can effectively cross-examine you at the time of trial.*" R. Vol. VI, Transcript, filed 2/13/03 at page 18 in the record on appeal in the Tenth Circuit, filed May 24, 2004.

Petitioners argued that it was improper to grant respondent's cross-motion since respondent used petitioners' personal papers not "at the time of trial" and as respondent attached those personal papers as exhibits to open pleadings, without protecting petitioners' financial identifying numbers. The outcome, besides a misuse of the Magistrate's order, was that petitioners' papers were made vulnerable to identity theft – thereby violating petitioners' right to privacy. Petitioners were, concurrently, denied their right to appeal the Magistrate's order, under Fed. R. Civ. P. 72, as petitioners produced their personal papers, in good faith *consistent with* the Magistrate's order that those documents be used at trial. The District Court or the Tenth Circuit never addressed petitioners' objections.

In seeking rehearing, petitioners note that:

Upon the Tenth Circuit's remand of this case back to the jurisdiction of the District Court, petitioners filed a Post-Judgment Motion to Seal those documents reiterating both of the arguments petitioners make above, attaching a copy of the related transcript in which the Magistrate ordered petitioners' taxes to be produced for trial. Petitioners relied on the District of Colorado's local rule 7.2 that requires a showing of "*compelling reason*" in which to seal papers and documents filed in a case.

On March 30, 2005, the U.S. Magistrate Judge issued his Order to seal the exhibits to both Quizno's Reply in Support of Motion for Summary Judgment as Docket #116 and Quizno's Response to Plaintiffs' Objections to Magistrate's Recommendation as Docket #122.[1] The Magistrate ruled that:

> "[t]he court finds that the plaintiffs have made a showing of compelling reasons for the sealing of their financial documents, to include tax returns, which are attached as exhibits to Dockets #116 and #122." App. A. at 2b.

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[1] Petitioners have filed an objection (in part) to the Magistrate's order that leaves open respondent's pleadings. Petitioners note that respondent's pleadings also refer to line item numbers and financial data from petitioners' income taxes and to seal just the exhibits, without also sealing the offending pleadings, does not fully accomplish the goal of protecting petitioners' privacy. Petitioners also note that consistent with local rule 7.2, ample time has expired and no public interest has objected to the pleadings being sealed and respondent did not respond to petitioners' motion to seal. As of the date of this Petition For Rehearing, the District Court has not issued its final order.

Petitioners sincerely do not wish to stretch the impact of this recent order. However, the Magistrate's order, essentially, favors the question presented by petitioners ... if there is "*compelling reason*" based on petitioners' identical arguments to seal the exhibits to both respondent's pleadings ... then it logically follows that there is "*compelling reason*" to conclude that those papers, as exhibits, should not have been used in an unprotected dispositive cross-motion, but rather, for the time of trial.

Consequently, the Tenth Circuit should not have affirmed the grant of respondent's cross-motion on damages, but rather, remand the case for a trial on damages, where petitioners can use their right to a secured and even-playing field with equalities not available in problematic written pleadings.

In rehearing, this Court is encouraged to be piloted by the enduring strength and vision of the American Constitution, written in a time when its architects could not image today's advanced technology that widens the door to both information exchange, but sorrowfully allows for information and identity abuse. Very simply, having produced personal papers in good faith, petitioners, and any American citizen engaged in civil proceedings, have the fundamental right to some assurance that their papers be secured and used – for the purpose in which those documents were compelled to be produced.

## II. THIS SUPREME COURT IS ENCOURAGED TO REVIEW FEDERAL RULE 56(d) AND THE PRACTICES OF THE TENTH CIRCUIT AS RELATED TO PRO SE APPEALS.

On April 12, 2005, after petitioners filed their Petition for Writ of Certiorari, Justices Kennedy and Thomas sat before Congress to address budget matters of this Supreme Court. While the hearing concerned mostly matters of the budget relating to the security of the Court, Justice Kennedy, in responding to a question, artfully noted that:

> "[t]he Constitution was not made for a bunch of lawyers or judges," but for the American people - and the people must see a link to the Constitution in its own time.

With respect to lawyers, Justice Kennedy's words ring true in this case, brought not by a "bunch of lawyers," but by pro se litigants dealing with everyday rule of law, Federal Rule 56, perhaps not as glamorous as the issues that make their way to this Supreme Court, but law when the standard is deviated from, can deny a citizen the simplest of Constitutional rights - that to be heard in trial.

While it is an honor to come to a court pro se, that right should not also carry with it an extra burden.[2] Petitioners would be remiss not to seek rehearing on that substantial ground (whether a party raises the issue at the outset of a case or before this Court is of no consequence). *United States v.*

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[2] In this case, petitioners come with costs paid, but, wish to note that it should matter not whether a pro se civil litigant come with costs or not.

*Corrick*, 298 U.S. 435, 440 (1936). Ideally, this Court is encouraged to review and amend the language of Fed. R. Civ. P. 56(d) that assumingly fails to recognize that a pro se litigant may be party to a cross-motion for summary judgment. Specifically, the language of Rule 56(d) states that:

> "[t]he court at the ***hearing of the motion***, by examining the pleadings and the evidence before it and *by interrogating counsel*, shall if practicable ascertain what material facts are actually in good faith controverted." Emphasis added.

The failure of the language of Rule 56 (d) to include an unrepresented party, in sync with other federal rules, subsequently, allows a Magistrate or District Judge, nationwide, to "literally" read Rule 56, automatically excluding a pro se litigant from the possibility or benefit of a *hearing*. While petitioners realize that a hearing comes with standards, the option for one must be non-discriminately inclusive in federal rules. Otherwise, such is both arbitrary and prejudicial to any and every American citizen, who may potentially find themselves, as petitioners did, coming to the courts pro se, by circumstances created by the respondent.

Accordingly, had a "hearing on the motion," in accordance with the standard of Fed. R. Civ. P. 56(d) been held by the Magistrate or District Court, this case may not have even found its cobbled-way to the Tenth Circuit and this Supreme Court.

This Court is also encouraged to review the practices of the Tenth Circuit as related to pro se appeals.[3] While petitioners properly requested oral argument in this case, the Tenth Circuit concluded that oral argument would not materially assist the determination of the appeal, citing Fed. R. App. P. 34(2) and 10th Circuit Rule 34.1(G). Federal Rule 34 is clear that oral argument ***must be allowed in every case*** and sets a standard for when oral argument is excluded.

However, the complete language of Tenth Circuit Rule 34.1 only recognizes the *"presence of counsel"* in oral arguments and appears to automatically exclude oral argument in all pro se appeals as the following language from the cited Tenth Circuit Rule 34.1(G), confusingly, implies:

> "[E]xcept in pro se appeals or when both parties have waived oral argument, the court will notify the parties when a panel decides that oral argument is not necessary."

Certainly, if afforded the benefit of a hearing, many of the erroneous findings of facts or the misapplication of law found in the Tenth Circuit's opinion may have been eliminated,

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[3] It should be noted that in addition to an inconsistency in 10th Circuit Rule 34 with Fed. R. App. P. 34, that the practice of 10th Circuit Rule is also inconsistent with Fed. R. App. P. 31 that requires an appellant's Opening Brief to be filed within 40 days after the record on appeal is sent to the Appellate Court. The 10th Circuit practice, as in this case, requires that an appellant's Opening Brief be filed within 40 days after the first notice of the appeal is sent to the Appellate Court. Consequently, pro se petitioners, do not have the advantage of the final record to prepare their Opening Brief or the equal time given to represented parties to formulate theories and authorities.

allowing petitioners their right to a trial on damages. Specifically, the Tenth Circuit wrongly concluded that the material breach was somehow cured – halting damages – although respondent acknowledged the possibility of lost profits in their stipulated to Pre-trial Order and refuses to examine the substantial equity of the franchise agreement, but then affirms the finding of the Magistrate that the franchise agreement was substantially equal.

The Tenth Circuit concludes, wrongly, that petitioners represented respondent in the Rocky Mountains, applying just Colorado law, although petitioners' area was Northeast Wisconsin and concludes that petitioners' Declaration (that shows a significant economic loss of income and expenses) somehow fall short, although fails to say exactly how. Ultimately, the Tenth Circuit fails to ascertain the undisputed material fact (that goes to the issue of the material breach being cured) that, as of this day, petitioners have no "valid" franchise agreement as the contractual language promises – or that petitioners had no obligation to accept the spoiled fruit of their contract that sat on the dock before delivery over eleven months late. In the end, respondent broke their promise executed in front of a federal court and left the injured party with $1.00.

In rehearing, petitioners encourage this Court to make a statement that the *same and equal benefit* for a "hearing on the motion," provided for in the language of Rule 56 (d), also, be extended to an unrepresented party.

## CONCLUSION

Petitioners, with respect, petition for rehearing to review and address the grounds now presented, to grant the Petition

For Writ of Certiorari on its merits and remand this case back to the Tenth Circuit, as appropriate.

Dated: June 8, 2005

Elizabeth Mollinger-Wilson
Lt. Colonel Robert Wilson, USMC-Ret.

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## CERTIFICATE

We, Elizabeth Mollinger-Wilson and Robert Wilson, do hereby certify that this Petition For Rehearing is presented in good faith and not for delay. The petition is restricted to the grounds specified in Rule 44 (2) of the Rules of the Supreme Court.

Respectfully Submitted:

Elizabeth Mollinger-Wilson

Elizabeth Mollinger-Wilson

Robert E. Wilson

Robert E. Wilson

Dated: June 8, 2005

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*Petitioners pro se*

## APPENDIX A

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

**No. 02-N-0436 (OES)**

**[Filed March 30, 2005]**

| | |
|---|---|
| Elizabeth Mollinger-Wilson and | ) |
| Lt. Colonel Robert E. Wilson, USMC-Ret. | ) |
| *Plaintiffs*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Quizno's Franchise Company, | ) |
| *Defendant*. | ) |
| | ) |

### ORDER

Entered by O. Edward Schlatter, United States Magistrate Judge

Plaintiffs have filed a (Post-Judgment) Motion To Seal Documents, requesting that the two documents filed by the defendant during the course of this litigation be sealed because financial documentation disclosed by the plaintiffs in the course of discovery in this matter was attached by the defendant as exhibits to the documents. On March 23, 2005, the motion was referred to me for resolution. Pursuant to

D.C.Colo.LCivR 7.1A, the plaintiffs indicate that they have conferred with counsel for the defendant in this regard, and that counsel indicates that the defendant opposes the motion. However, the Certificate of Service attached to the plaintiffs' motion indicates that defendant was served, by mail, with this motion on February 24, 2005. To date, no objection or resistance to the motion has been filed by the defendant.

In their motion, plaintiffs request the sealing of Quizno's Reply in Support of Motion for Summary Judgment, filed on May 6, 2003, as Docket #116, and Quizno's Response to Plaintiffs' Objections to Magistrate's Recommendation, filed on November 3, 2003, as Docket #122. When a party requests a seal order, a court must carefully balance the competing interests that are at stake in the particular case. *See Nixon v. Warner Communications*, 435 U.S. 589, 599 (1978). The ultimate decision to issue a seal order lies in the trial court's sound discretion. *Id.*

In balancing the respective interests of the parties and the public, the court finds that the plaintiffs have made a showing of compelling reasons for the sealing of their financial documents, to include tax returns, which are attached as exhibits to Dockets #116 and #122. However, it is not necessary to completely seal Dockets #116 and #122. Based on the information contained in their motion, plaintiffs' interests will be sufficiently protected by sealing only the exhibits attached to the defendant's filings. Additionally, by only sealing the exhibits, the public's interest in access to the filings of the defendant will not be unduly infringed.

Accordingly, it is hereby ORDERED that Plaintiffs' (Post-Judgment) Motion To Seal Documents (Filed February 24, 2005; Docket #1501) is GRANTED in part and DENIED in

part. The Office of the Clerk is directed to place under seal only the exhibits attached to each of Dockets #116 and #122.

BY THE COURT:
/s/

O. Edward Schlatter
United States Magistrate Judge